

THE
LAW AND PRACTICE

OF THE

High Prerogative

WRIT OF MANDAMUS,

AS IT OBTAINS BOTH IN

ENGLAND,

AND

IN IRELAND.

BY

THOMAS TAPPING,

OF THE MIDDLE TEMPLE ESQ., BARRISTER-AT-LAW

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TO

Sir John Servis,

HER MAJESTY'S ATTORNEY-GENERAL,

M., P.,

&c. &c. &c.

THIS WORK,

IS WITH HIS KIND PERMISSION,

MOST RESPECTFULLY DEDICATED,

BY HIS OBLIGED SERVANT,

THE AUTHOR.

P R E F A C E.

THE necessity of a Work upon the Law and Practice of the High Prerogative Writ of Mandamus, was made known to the Author during his pupilage in the Chambers of a Special Pleader, when having such a writ to prepare, he was informed that the only sources from whence the Student or Practitioner could obtain any information upon this most important branch of legal learning, were the cases scattered through the Books of Reports, excepting, however, the brief accounts of the writ which were to be found in *Compendious Crown Practices*, and in a small treatise on the subject by Impey, published in 1826, which last mentioned work had been rendered useless by recent statutory enactments—namely—the stats. 1 Wm. 4, c. 21; 1 & 2 Wm. 4, c. 58; 1 Viet. c. 78; 6 & 7 Viet. c. 67, &c., &c.

On a subsequent occasion, the Author again felt the necessity of a specific Treatise upon the subject, which fact, together with the liberality with which for the benefit of the subject, and the advancement of justice, the writ has of late years been dispensed by the Court of B. R., and also, that by the passing of the remedial statutes 6 & 7 Viet. c. 67, as to England, and the 9 & 10 Viet. c. 113, as to Ireland, it is clearly the general policy of the Legislature, to promote it as a remedy, induced the Author to study, and consider the subject, and endeavour to supply to the Profession a Work which would at least be useful. The result of his labours is the present Volume, the scheme of which may be readily seen, by a reference to the Table of Contents.

In investigating the subject, the Author has endeavoured to give, not only as well all the legal principles which govern the dispensation of

the writ, as the decisions which have relation to its *formulæ*, but has also constructed an Alphabetical Series of the subjects of those matters which from the earliest cases to the 7th Q. B. Reports inclusive, have been decided by the Court of B. R. to be either within or without the jurisdiction of the writ of *mandamus*. It is trusted that this series, which extends over above 250 pages, will be found useful to the Practitioner, as thereby he will be enabled to ascertain at a glance how far such court has either dispensed or refused the writ as to any subject respecting which its interference has been asked.

The Table of Cases has also been drawn up with some care, and differs from tables of the same kind in two particulars. First, that to each Case is affixed the names of the Reports, &c., in which it is to be found. This was rendered necessary by the occurrence of so many cases of the same name, owing to the fact that the Queen is invariably the prosecutor of, and that corporations or artificial persons are for the most part defendants to the writ. Thus, there are no less than twenty-nine cases, each of which bears the name of *R. v. Middlesex (J.)*; twenty-eight of the name of *R. v. West Riding (J.)*, and so of many other instances. Secondly, that to each case, and its reference, has been added the name of all the concurrent reports, in which it is also to be found, in order that the Practitioner may, by a perusal of all the authorities of the same case, determine with particularity its exact legal value, the importance of which will be readily acknowledged when it is known that many of the old Reporters record different facts of the same case, and sometimes disagree in the result of the decision.

The Appendix, together with a few specimens of the Writ in its earlier phases of a "*Letter Missive*," "*Parliamentary Writ*," "*Writ of Restitution*," &c., &c., contains a complete collection of both the English and Irish statutory enactments on the subject; also a list of the Rules, Orders, and Regulations made by the Court of B. R., in pursuance of the stat. 6 Vict. c. 20, for the government of the practice of the Crown side of such Court in England, and a Table of Fees ordained by the Court of B. R., under the authority of the above statute, to be taken by the Queen's Coroner and Attorney, and Master on the Crown side of such Court.

It will be seen by the title page, that this Volume professes to give the law and practice of the Writ of Mandamus as it obtains in Ireland. That this object has, to some extent at least, been accomplished, is clear, from the fact, that the Writ of Mandamus, as it obtains in Ireland, has as to its *formulae* been made, by recent statutory enactments, identical with that Writ as dispensed in England; the words of the statutes, relating to both portions of the United Kingdom being, for the most part, precisely the same. Thus the provisions of the Irish statute, 19 Geo. 2, c. 12, will be found, on comparison, to be *totidem verbis* with those of 9 Ann. c. 20, and 11 Geo. 1, c. 4. Again, the Irish statute, 9 & 10 Vict. c. 113, will, on examination, be found to contain the aggregate provisions of the English statutes, 1 Wm. 4, c. 21, 1 & 2 Wm. 4, c. 58, and 6 & 7 Vict. c. 67; so that it may with perfect truth be affirmed, that the *formulae* of the Writ, as it obtains in England and Ireland, are governed by the same statutory enactment.

How far the Author has succeeded in his endeavour to produce a Work, which will be useful to the Profession, remains for the Profession itself to judge. The Author may remark that the labour has not been trifling, nor the care small, which he has bestowed upon its production. Errors there may be, doubtless many, yet he trusts that the vast number of, and oftentimes conflicting authorities cited, may entitle his Work to the kind consideration and good opinion of the Profession.

8, MITRE COURT CHAMBERS, TEMPLE,
16TH MAY, 1848.

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52 Geo. 3, c. 93	129		276, 289, 339, 450
53 Geo. 3, c. 127	67	6 & 7 Wm. 4, c. 71	261
55 Geo. 3, c. 50	89	6 & 7 Wm. 4, c. 85	248
55 Geo. 3, c. 68	133	6 & 7 Wm. 4, c. 96	210, 222
56 Geo. 3, c. 65	66	6 & 7 Wm. 4, c. 114	228
57 Geo. 3, c. 19	251	7 Wm. 4 and 1 Vict. c. 78	37, 45, 57,
57 Geo. 3, c. 29	52	58, 59, 93, 99, 101, 165, 166, 179, 180,	184, 442, 450
58 Geo. 3, c. 45	68	1 & 2 Vict. c. 110	216
59 Geo. 3	134	2 & 3 Vict. c. 85	48
59 Geo. 3, c. 12	270	4 & 5 Vict. c. 31	415
59 Geo. 3, c. 134	68	4 & 5 Vict. c. 59	136
3 Geo. 4, c. 23	53, 92	5 & 6 Vict. c. 5	133
3 Geo. 4, c. 33	251	5 & 6 Vict. c. 22	228
3 Geo. 4, c. 113	215, 216	5 & 6 Vict. c. 111	87, 141
3 Geo. 4, c. 126	132	6 Vict. c. 20	389
4 Geo. 4, c. 95	131, 136	6 & 7 Vict. c. 67	7, 17, 43, 51, 67, 91,
4 Geo. 4, c. 119	139	98, 119, 123, 128, 134, 142, 207, 210,	224, 231, 240, 241, 242, 296, 372, 375,
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7 Geo. 4, c. 64	98, 104	6 & 7 Vict. c. 86	248
7 & 8 Geo. 4, c. 29	123	6 & 7 Vict. c. 89	38, 45, 46, 50, 51,
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9 Geo. 4 c. 15	390		256, 262, 287, 298, 407, 453
9 Geo. 4, c. 40	63	6 & 7 Vict. c. 90	255
9 Geo. 4, c. 61	41	7 & 8 Vict. c. 101	47, 48
9 Geo. 4, c. 92	252	7 & 8 Vict. c. 110	82
10 Geo. 4, c. 6	128	8 Vict. c. 10	47
10 Geo. 4, c. 59	113, 157, 158	9 & 10 Vict. c. 113 (1.)	173, 183,
10 Geo. 4, c. 56	128, 252	210, 224, 231, 240, 241, 242, 289, 299,	302, 306, 307, 313, 333, 334, 341, 342,
11 Geo. 4 & 1 Wm. 4, c. 60	22, 159	343, 344, 349, 371, 372, 375, 376, 377,	380, 381, 383, 384, 385, 387, 388, 392,
11 Geo. 4 & 1 Wm. 4, c. 70	296	393, 394, 395, 396, 397, 398, 400, 402,	404, 408, 411, 412, 415, 416, 418, 419,
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1 & 2 Wm. 4, c. 58	343, 411, 447, 448,		
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Note.—Cases cited to which a dagger. † is annexed are inserted in the English Common Law Reports, Philadelphia Edition. Those to which a star * is annexed, have been reported in the recent decisions of the Court of Exchequer, Edited by Messrs. Hare and Wallace.

T. & J. W. JOHNSON.

THE
LAW AND PRACTICE
OF THE
High Prerogative
WRIT OF MANDAMUS.

CHAPTER THE FIRST.

OF THE ORIGIN AND HISTORY OF THE HIGH PREROGATIVE WRIT OF
MANDAMUS.

THE WRIT, the subject of this Treatise, has, since its institution as a legal formula, become so changed and amplified, both in form and efficacy, that some have been induced to consider it to be of almost modern establishment; whereas the truth is, that so early as the thirteenth century, it was but a species of that ancient and extensive, but now obsolete class of writs, whose generic name was "*mandamus*," (a)

(a) The term "*mandamus*" is to be found in a great variety of ancient writs, privy seals, &c. (see App. Forms B. C. and D.,) totally different from the modern writ, which for the sake of distinction was usually called a *special mandamus*, R. v. Dr. Gower, 3 Salk. 230. Among the several species of ancient writs of *mandamus* were the following :

1st. A writ that lay on the death of one of the king's tenants to inquire of what lands he had died seised; it was granted after the year and day, when in the meantime the writ called *diem clausit extremum* had not been sent out to the escheator, Spathurst's case, Hob. 101; Fitz. N. B. fol. 253 b, 561. See stat. 12 Car. 1, c. 24; Dyer. 170 a, 209.

2nd. A writ, in the nature of a charge to the sheriff, to take into the king's hands all the lands and tenements of the king's widow, who, against her oath formally given, married without the king's consent, Reg. fol. 195 b; Blount's Dic. tit. "*Man.*;" Termes de la Ley, tit. "*Man.*;" Toml. Law Dict. tit. "*Man.*"

As to a royal *mandamus* for the granting of academical degrees, &c., see R. v. Cambridge (U.,) Burr. 1651.

As to a *mandamus* from Chancery, see Mayor of Coventry's case, 2 Salk. 429.

but which writ, on account of its pre-eminence and gradual development [*2] *during centuries of judicial nurture, ultimately became, and is now known to us by the appellation of "*The High Prerogative Writ of Mandamus.*"(b)

At so early a period of our legal history did this writ exist as an instrument or means whereby various public duties and powers were commanded and enforced, that the exact date of its institution cannot, with any accuracy, be shewn. An attentive consideration, however, of its general character, and of the principles upon which it is founded, namely, those of the common law,(c) shews that its origin may be safely referred to that clause of the Magna Charta, which declares that "*nulli negabimus aut differemus justitiam vel rectum.*"(d)

Many instances are recorded of the writ having issued so early as the reigns of Edw. 2, and Edw. 3, and Lord Mansfield, in an elaborate judgment,(e) while descanting upon this point, states, that in a manuscript book of reports which he had seen, the reporter in reporting Dr. Bonham's case, cites the case of a mandamus temp. Edw. 3, directed to the University of Oxford, commanding the restoration of one upon whom the sentence of "*bannitus*" had been passed.(f) So that it is not true that the writ was first used so lately as the reign of James 1, in a case called Bagg's case;(g) probably, however, Bagg's case was merely the first writ, in its judicial form, which had reference to *municipal corporations*, for it was not till long afterwards, namely, an. 12 Wm. 3, that such writs were entered of record; at which time a rule of Court was promulgated, that they should be so entered of the same Term they came in.(h)

In the Cottonian Manuscripts(i) also, and in those valuable [*3] repertoria of historical facts and judicial proceedings, made accessible to all by the learned labours, among others, of Rymer, Madox, Palgrave, and Nicholas, we find many and distinct evidences of its existence

(b) See meaning of "*Prerogative,*" post, p. 4, n. (a.)

(c) R. v. Bosworth, Stra. 1113.

(d) 10 Mod. 53.

(e) Dr. Askew's case, Burr. 2190. In R. v. Cambridge (U.), Fort. 202, they are stated to be much older than the reign of Edw. 1.

(f) 10 Mod. 57, per Powys, J., and in Widdrington's case, M. 13 Car. 2; 1 Lev. 25. S. C. 1 Keb. 132, the antiquity is stated as in the text. Hern's case is there stated to have been the first writ of mandamus; its date, however, is not mentioned. Imp. Man. 1, n. (a). So in Riley, 534, is a mandamus, an. 5 Edw. 2, which is cited in Dr. Askew's case, Burr. 2190. Early instances of the writ are, Anable's case, temp. Hen. 6. Middleton's case, 2 Dyer, 332 b; E. T. 16 Eliz. Tompson v. Edmunds, 2 Roll. Abr. 456, pl. 4; T. 4 Jac. Meddlecott's case, 10 Eliz.; 6 Edw. 2; Clo. Roll. Mem. 8.

(g) T. 13 Jac. 1; 11 Rep. 93 b, which has been often alleged to have been the first case of mandamus, 1 Show. 263; some have limited the expression to the first mandamus "*in corporation cases,*" R. v. Barker, 1 W. Blac. 352, per Lord Mansfield, C. J. R. v. Heathcote, (Mayor,) 10 Mod. 57, per Powis, J.

(h) Stra. 540, per Fortescue, J. See post, tit. "*Judgment,*" (Entry of Proceedings.)

(i) Bibl. Cotton, Cleopatra, f. 111, f. 115.

during the fourteenth and the commencement of the fifteenth centuries.(j)

At this period, the writ was in form no more than a mere lettermissive from the sovereign power commanding (“*mandamus*,”) the performance of a particular act or duty by those to whom it was directed and sent; to it no return was allowed, and disobedience of its commands was punishable by attachment.(k)

Subsequently, during the latter half of the fifteenth century, the writ was directed to issue “*per regem et concilium*” upon a petition to Parliament for redress; it then became in form a parliamentary writ;(l) and about the same time, from it being chiefly used merely to enforce restitution to public offices, received from such its object and effect, the appellation of “*Writ of Restitution*,” by which name it is designated in all the older abridgments and reports.(m)

At length, on account of its extensive use and highly remedial nature, it obtained the sanction of an original writ, and was dispensed by the Court of B. R. in all cases where there was a legal right to justice, but for which right the law had not provided any specific legal remedy,(n) and by an amplification of its jurisdiction, it was allowed to embrace matters not strictly involving the notion of a restitution; as where it commanded an “*admission*” to an office, &c. At the same time its appellation was again, but for the last time changed to that of “*mandamus*,”(o) which, when such writs were in Latin, was the first word of the mandatory clause.(p)

*Of late years our writ has been liberally interposed for the benefit of the subject and the advancement of justice; and it [*4] would seem, from a consideration of the several acts of Parliament which have recently been passed with a view to make it more remedial and useful, that it is the general policy of the Legislature to promote it as a remedy.(q)

(j) See Appendix, Forms A. B. C. and D.

(k) R. v. Dublin (Dean.) Stra. 540, per Fortescue, J. R. v. Dublin (Dean.) 8 Mod. 29. R. v. New Coll., 2 Lev. 15. R. v. Buckingham (Corp.) 10 Mod. 175. See such a writ, Appendix (A.) “*Mandata principum, sunt monita et præcepta quæ rectoribus provinciarum, aliisque magistratibus palam, vel arcano, litteris dabantur*,” Frontin: de Aquæductib. Artic. 3. It is not, however, to be understood by the above quotation that the Romans had any such proceeding as a “*Mandamus*.”

(l) Riley, fol. 601. R. v. St. John’s, Cam., Comb. 281; 2 Keb. 167, 168, per Twisden, J. See Appendix, Form D. See post, tit. “*University*” (Scholar, Restoration.)

(m) See Taylor’s case, Poph. 133; Bulstrode’s Rep. passim. R. v. Taylor, 3 Salk. 230. See Lord Hale’s Analysis, where it is so called.

(n) R. v. Dublin (Dean.), 8 Mod. 29.

(o) See Form, Appendix D.

(p) In temp. Hen. 2, the mandatory clause of writs usually commenced with the words, “*præcipio tibi*,” or “*ideo præcipio tibi*.” Glan. lib. 1, cc. 13, 14, 17, 19, &c.; lib. 6, cc. 5, 15, 18. Inter mandare et præcipere hoc interest, quod illud est minus imperio sum, et erga æquales, aut etiam superiores exercetur, hoc totum est imperii, et potestatis. Illo quippiam edicimus ab alio sæpe exequendum quam ei cui mandamus, hoc ab ipso illo cui præcipimus. Sueton. in Ner. c. 40, extr.

(q) R. v. Jeyes, 3 A. & E. 421.† R. v. Oundle (Manor,) 1 A. & E. 297.†

CHAPTER THE SECOND.

A DEFINITION OF THE MODERN WRIT OF MANDAMUS, TOGETHER WITH
A BRIEF OUTLINE OF ITS PROCEEDINGS FROM THEIR COMMENCEMENT
TO THEIR TERMINATION.

BEFORE proceeding to a detailed consideration of our subject, it may be useful to define it, and to state in a few words its general outline.

The modern writ of mandamus may be defined to be, as before stated, a high prerogative writ, *(a)* *breve regium*, *(b)* and not a writ of right; *(c)* it is properly and in its nature, a writ of restitution *(d)* of a most extensive *and remedial nature, *(e)* to the aid of which the subject is [*5] entitled, upon a proper case previously shewn to the satisfaction of the Court of B. R. *(f)* It is founded on Magna Charta, cap. 29, *(g)* and was introduced to amplify justice by the prevention of disorders, arising from either a failure or defect of police. It is therefore used and resorted to on *all* occasions where the prosecutor has a legal power consequent upon the violation of some legal right or duty, for which the law has not established any specific or adequate legal remedy, and where, in

(a) Ante, p. 2. *Knipe v. Edwin*, 4 Mod. 281. *R. v. Barker*, 1268. S. C. 1 W. Blac. 300, 352. *R. v. Dublin (Dean)*, Str. 536. By the term prerogative writ is meant either firstly, that the power to award is not delegated by the Crown to the ordinary judges between party and party, that is, the justices of C. B., but is reserved for that Court in which the Queen is supposed to be personally present; or secondly, that such a writ is one of grace and favour granted according to discretion upon probable cause shewn, and not a writ of right, that is, not such a writ as the subject has a right to call upon the Court to issue under the clause of Magna Charta, by which the Queen is bound not to refuse or delay justice or right. 4 Mod. 340; 3 Bl. Com. 132. *R. v. Cowle*, Bur. 855.

R. v. Chester (Ep.), 1 T. R. 369. *R. v. Stafford (Marquis)*, 3 T. R. 646; 4 Bac. Abr. Man. C. D. *R. v. Cambridge (U.)*, 1 W. Blac. 551. *R. v. Birmingham Canal*, 2 W. Blac. 708.

(b) *R. v. Patrick*, 1 Keb. 610. These writs are called by Coke (Calvin's case, 7 Rep. 20; Vaughan, 401), *brevia mandatoria remedialia*, because they are resorted to for the purpose of restoration, and not to turn out, &c. 4 Mod. 234, 281; Bac. Abr. tit. "Man." (A). The writ was also emphatically called the *festinum remedium*, from its speedy dispensation of justice (Stra. 540).

(c) See note *(a)*. *R. v. Excise Commissioners*, 2 T. R. 385. *R. v. Clear*, 4 B. & C. 901.† *R. v. Paddington Vestry*, 9 B. & C. 461.†

(d) *R. v. Buckingham (Corp.)*, 10 Mod. 173. It is by Lord Hale, in his Analysis, expressly called a writ of restitution, 4 Mod. 234; 2 Bulst. 122. *R. v. St. John's Coll.*, Comb. 281. The Roman law has this rule, "*Cum et verbum restituas lege invenitur etsi non specialiter de fructibus additum est: tamen etiam fructus sunt restituendi.*" D. 50, 17, 173 (1).

(e) *R. v. West Riding (J.)*, 3 N. & M. 88;† 1 Show. 219. Calvin's case, 7 Rep. 20; 3 Bl. Com. 110; 3 Steph. Com. 682.

(f) The Court must be satisfied that they have jurisdiction to grant the writ, because, being a prerogative writ, it will not be issued as of course, nor be granted merely for asking, *Dr. Askew's case*, Burr. 2190, 2191, 2192. The power of issuing this writ belongs exclusively to the Court of B. R., and is considered as one of the *flowers* of that Court. *Awdley v. Joy*, Poph. 175; Imp. on Man. 1, n. *(b)*; 3 Bl. Com. 110; 4 Mod. 240; 4 Inst. 71; Year Book, 1 Il. 4, pl. 19; 6 Il. 6, pl. 29.

(g) 10 Mod. 53.

justice and good government, there ought to be one.(h) It is not applicable as a redress for mere private wrongs.(i)

In its form, it is a command issuing in the Queen's name from the Court of B. R., and directed to any officer, person, artificial person, or corporation within the Queen's dominions, requiring the performance of some act or duty therein specified, the execution of which, such Court has previously determined to be consonant to right and justice.(j)

The writ is ordinarily obtained on the motion of counsel to the Court of B. R. at Westminster, during Term, supported by a suggestion, on the oath of the party injured (*prosecutor*) of his right, and of the denial of justice by the defendant;(k) whereupon, in order more fully to satisfy the Court that there is a probable ground for its interposition, a rule (*nisi*) is made (except in some general case where such a ground [*6] *is manifest),(l) requiring the defendant "to shew cause why a writ of mandamus should not issue."

By stat. 1 Wm. 4, c. 21, s. 4, relief is afforded to officers and other persons, whose duties are to admit to offices, or to do or perform other matters, in respect of which they claim no right or interest; by providing in favour of such persons, that it shall be lawful for the Court to which application is made for the writ of mandamus to relieve them from the liabilities incident to the execution thereof, by calling upon any other person having or claiming any interest in the matter of such writ, to appear and shew cause against the issuing of the same, and thereupon to make such rules and orders between all parties as the circumstances of the case may require.(m)

If, on the discussion of the rule, the defendant do not shew a sufficient cause against it, it is made absolute, and a writ is issued in the alternative, commanding him by a day therein expressed, called the "return-day," either to execute the command of the writ, or signify to the Court some reason to the contrary,(n) which writ is personally served upon the defendant.

If such a writ be defective in form, it may in certain cases be amended, but if the defect be not the subject of amendment, it must either, according to circumstances, be superseded or quashed, for the prosecutor cannot, upon such a writ, safely or advantageously prosecute his right.

(h) Burr. 1265, 1268, per Wilmut, J. S. C. 1 W. Blac. 300, 352, supra. R. v. Windham, Cowp. 378; Com. Dig. tit. "Man." A. It lies, as will be seen hereafter, in some cases where the applicant has another, though a more tedious remedy, or when the specific remedy is obsolete. See post, 3 Bl. Com. 110; 3 Steph. Com. 682. R. v. England (Bank), 2 B. & A. 622. R. v. Oxenden, 1 Show. 263.

(i) R. v. Clear, 4 B. & C. 901,† per Holroyd, J. R. v. Montacute, 1 W. Blac. 61. S. C. 1 Wils. 283; Com. Dig. tit. "Man." (A). R. v. Dublin (Dean), Stra. 536; Poph. 176; 1 Lev. 291.

(j) 3 Bl. Com. 109; 3 Steph. Com. 681, supra, n. (a).

(k) 3 Bl. Com. 111; 3 Steph. Com. 683. See tit. "Application," post.

(l) 3 Steph. Com. 683. See tit. "Rule," post.

(m) 3 Steph. Com. 685. See stat. App.

(n) 3 Bl. Com. 111; 3 Steph. 683.

If, however, the writ be good both in substance and form, the defendant must duly proceed to execute it, and if he by the time mentioned fail therein or do not return to the Court a legally sufficient excuse or justification for such failure in his respect and obedience, he is liable to be punished for his contempt by attachment.(o) Before the statute 9 Ann. c. 20, the practice was, not to issue an attachment for a neglect to return the writ until after the issue of alias and pluries writ.(p)

Formerly if the defendant returned a legally sufficient cause: although false in fact, the Court would not(q) try the truth of the return upon affidavits, but in the first instance assume it to be true, and decline to proceed further on the mandamus.(r) The prosecutor was therefore, if such were the case, compelled to shew by extraneous proceedings, that such return was false, which was done by bringing an action against the defendant for a false return; and if it *were found by the jury to be [*7] false, the prosecutor not only recovered damages equivalent to the injury sustained, but if such action were in the Court of B. R., had awarded to him a mandamus, peremptorily commanding the defendant to do his duty.(s)

This course of practice having been found most oppressive and dilatory, the Legislature, by stat. 9 Ann. c. 20, made the writ a most full and effectual remedy, in the first place, for refusal of admission where a person is entitled to a corporate office or place; and secondly, for wrongful removal, when such an one is legally possessed;(t) for such statute (amended and extended by stat. 1 Wm. 4, c. 21, to writs of mandamus in all cases,) amongst other things requires that a return be immediately made to the first writ of mandamus, thereby rendering the issue of an alias or a pluries in ordinary cases unnecessary. The same statute also declares that such return may be pleaded to, or traversed by the prosecutor, and that the defendant may reply, take issue or demur, and the same proceedings had, as if an action on the case had been brought *for making a false return*; and that after judgment obtained for the prosecutor, he shall have a peremptory writ of mandamus to compel his admission or restitution.(u)

Thus, the writ of mandamus in cases within the statutes, is, to a certain extent, assimilated both in its direct and incidental proceedings to an action; the prosecutor, if he ultimately succeed, being according to the maturity of the case, entitled to the damages and costs, to bring a writ of error, and to issue execution.(v) The prosecutor may, however, still bring his action for a false return.

(o) 3 Bl. Com. 111. See tit. "Return."

(p) See tit. "Rule to return writ."

(q) See stats. 9 Anne, c. 2; 1 Wm. 4, c. 21, post.

(r) 3 Bl. Com. 111; 3 Steph. Com. 684. See tit. post, "False Return."

(s) 3 Bl. Com. 111; 3 Steph. Com. 684. See tit. "Peremptory Writ."

(t) 3 Bl. Com. 264. See stat. App.

(u) 3 Bl. Com. 265. See stat. App.

(v) 3 Bl. Com. 265. See post, tit. "Error." R. v. Jeyes, 3 A. & E. 421.† R. v. Oundle (Mayor), 1 A. & E. 297.†

If on the other hand, the defendant return to the writ legally insufficient grounds of excuse or justification, then there issues upon the disallowance of such return, a second writ, called a "peremptory mandamus" peremptorily commanding the defendant to execute its command, to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ.(w)

The sufficiency of the return in point of law, was formerly determined, either summarily upon motion, in case it was clearly bad or insufficient, or on *concilium* after a special argument, when its insufficiency was not so apparent.(x) But by a late statute (6 & 7 Vict. c. 67) it is enacted, that the prosecutor objecting to the validity of the return, shall do so by way of demurrer to the same, in like manner as in personal actions;(y) and thereupon, the writ, return, and demurrer, shall be [*8] entered on record; and the court shall adjudge either that the return is valid in law, or that it is not valid in law, or that the writ of mandamus itself is not valid in law; and if it adjudge that the writ is valid, but the return invalid, they shall award a peremptory mandamus, and shall also in any event award costs to be paid to the successful party. The same statute also provides, that either party shall be at liberty in every case where judgment is given against him upon a mandamus, whether after demurrer or otherwise, to prosecute a writ of error thereon, according to the ordinary course of a writ of error in personal actions.(z) So that by virtue of this last statute, the writ of mandamus is at this day, from the period at least of the return, entirely assimilated to an action.(a)

If the prosecutor be ultimately successful, the Court will award to him his peremptory writ of mandamus, which when served upon the defendant, he is bound to obey, under pain of an attachment; but which peremptory writ is, if prematurely issued, or for any inherent defect, liable to be quashed by the Court.

If the defendant be ultimately successful, he is entitled, under the above statutes, to his costs, and to writs of execution against the prosecutor for the recovery thereof.

(w) 3 Bl. Com. 111; 3 Steph. Com. 684. See tit. "Peremptory Writ."

(x) 3 Steph. Com. 684. See Ind. "Return."

(y) The general rules of pleading and practice are applicable to cases of mandamus, and its incidental proceedings.

(z) 3 Steph. Com. 685. See tit. "Error."

(a) 3 Steph. Com. 684. See tit. "Plea."

[*9]

*CHAPTER THE THIRD.

OF THE LEGAL PRINCIPLES WHICH GOVERN THE DISPENSATION OF THE WRIT OF MANDAMUS, TOGETHER WITH AN ALPHABETICAL SERIES OF THE SUBJECTS IN RESPECT WHEREOF THE WRIT HAS BEEN EITHER GRANTED OR DENIED.

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1st. *Mandamus—Its Jurisdiction—In what Cases it issues.*

THE grounds upon which the Court of B. R. formerly granted or refused the writ of mandamus, are not in the ancient cases explicitly stated, but during the time Lord Mansfield presided in that Court, he took great pains to state particularly the circumstances which induced the Court either to refuse or grant the writ. (a) The effect of the various decisions, however, is, that the Court of B. R. as the general guardian of public rights, and in exercise of its authority to grant the writ, will render it, as far as it can, the suppletory means of substantial justice in every case where there is no other specific legal remedy for a legal right and will provide as effectually as it can that all official duties are fulfilled, [*10] wherever the subject-matter is properly within its control; *the right of the Court to apply this means for the attainment of such an end, and to prevent that defect of legal justice which might otherwise ensue, has been in general admitted. (b)

The principle above stated may be otherwise expressed thus, that the Court of B. R. will not interpose by granting the extraordinary writ of man-

(a) 1 T. R. 404; 4 B. & Ad. 360.† S. C. 1 N. & M. 124.† Dr. Askew's case. Burr. 2188, 2189. Bac. Abr. tit. "Man." R. v. Jeyes, 5 N. & M. 104.† R. v. Wyndham, Cowp. 378,

(b) R. Canterbury (Archbp.), 15 East. 135. per Ellenborough, C. J.; 2 B. & C. 598.† S. C. 4 D. & R. 132.†

damus, unless the applicant have not only a specific legal power, properly the subject of this writ, a fulfilment of which is demandable from the person to whom such writ must be directed, but also, there must not exist a specific legal remedy, whereby the fulfilment of such power may be compelled; *(c)* so that the writ will not be granted unless to prevent a failure of justice, *(d)* that is, it issues upon the assumption that that which ought to have been done at a time past has not been done. *(e)*

The writ can only properly issue to command the doing or performance of some act or duty in execution of a legal obligation, and has not the same operation as the ancient writ *de non molestando*. Thus the Court refused the writ to command justices to suffer a dissenting minister to preach in a particular meeting-house. *(f)* So a mandamus will not be granted in anticipation of a defect of duty or error of conduct. *(g)*

The Court of B. R. has no jurisdiction to grant the writ in any case except those in which it is the legal judge of the duty required. Thus it cannot interfere with a visitor's duty, it being a private and domestic jurisdiction, over which the Court of B. R. has not ordinarily any control. *(h)*

*The jurisdiction of the Court to command the execution of the particular act or duty, the subject-matter of the writ, must be [*11] clear, otherwise it will not interfere. Thus, where the charter of a borough directed that when it should happen that any of the capital burgesses should die, dwell out of the borough, or for some cause be removed, it should be lawful for the remainder to elect others in the place of those so happening to die or be removed; it was held that these words were not so unambiguous as to warrant the Court in granting a mandamus to admit two persons in the room of two non-resident capital burgesses, the corporation not having previously removed them from their offices for this cause. *(i)* Formerly the Court was very astute in seeing to its juris-

(c) 1 T. R. 404; 4 B. & Ad. 360.† S. C. 1 N. & M. 124.† R. v. Windham, 1 Cowp. 377.

(d) R. v. Fowey (Mayor), 2 B. & C. 598.† S. C. 4 D. & R. 132. R. v. Norfolk (J.), 1 D. & R. 75.† R. v. Ely (Ep.), 2 T. R. 345. R. v. Montacute, 1 W. Blac. 64. S. C. 1 Wils. 283. Dr. Askew's case, Burr. 2189. R. v. Canterbury (Archbp.), 8 East, 219. R. v. Canterbury (Archbp.), 15 East, 133. R. v. Chester, 1 W. Blac. 22. S. C. 1 Wils. 206. Bac. Abr. tit. "Man."

(e) R. v. Gloucester (J.), 6 N. & M. 117, 118.† R. v. Leeds (J.), 4 T. R. 583. R. v. Wilts (J.), 13 East, 352. R. v. Essex (J.), 4 B. & Ald. 276.† R. v. Salop (J.), 4 B. & A. 626. R. v. Suffolk (J.), 9 D. & R. 111.† S. C. 6 B. & C. 110.†

(f) Peat's case, 6 Mod. 229. S. C. 2 Salk. 572. It seems, however, according to the reasoning of the Roman law, that the quiescence or neutrality of the justices, as stated in the text, would have been deemed equivalent to "action." For it is laid down in such law, that "Qui non facit, quod facere debet; videtur facere adversus ea, quia non facit. Et qui facit, quod facere non debet: non videtur facere id, quod facere jussus est." Paulus, (lib. 13, ad Edict.) D. 50, 17. 121.

(g) Blackborough v. Davis, 1 P. Wms. 48.

(h) Year Book, 8 Edw. 3; Lib. Ass. pl. 29. Philips v. Bury, 1 Sid. 71. S. C. 2 Show. 170; Mod. 82. 2 Keb. 799, 861. S. C. cited in 2 T. R. 355. R. v. Chester (Ep.), 1 W. Blac. 22. S. C. 1 Wils. 206.

(i) R. v. Truro (Mayor), 3 B. & A. 590. R. v. Ely (Ep.), 1 W. Blac. 54. S. C. 1 Wils. 266.

diction, even, for instance, in a case where a statute specially delegated to the Court the power of enforcing certain duties and requirements by writ of mandamus; (*j*) because the ancient form and method of proceeding by mandamus prevented the judgment of the Court from being reversed by any Court of Error, a consideration which induced the Court to be cautious in assuming jurisdiction; but now, since this defect has been remedied by statute, the Court never declines to interfere in any case clearly within its jurisdiction; for it has no more right to refuse to any of the Queen's subjects the redress which it is empowered to administer, than to enforce against them powers not confided to it. (*k*)

As to the jurisdiction of the writ, it may be generally stated, that it comprehends the execution of the common law, of statutes, acts of Parliament, (*l*) or of the King's charter, (*m*) in all cases for which there exists no legal remedy. It is not, however, applicable as a private remedy, (*n*) to enforce simple common law rights between individuals as to compel payment of money due on bond, or the restitution of chattels, still less to command a party to abstain from a tort or from the abuse of his office. (*o*)

And where the Court of B. R. has power to amend all extra-judicial errors which tend to the breach of the peace, oppression of the subject, [* 12] *or other misgovernance, (*p*) such Court may, by such writ, command right to be done. Thus where a corporate officer is removed without cause, he may be restored by mandamus. (*q*)

So wherever there is a right to execute an office, to perform a service, or exercise a function or franchise, (more especially if it be matter of public concern, or attended with profit,) (*r*) and a person is kept out of possession or dispossessed of such right, and has no specific legal remedy, the Court of B. R. will assist by mandamus for the sake of justice, in order to preserve peace and order: or as the writ formerly expressed it, "Nos A. B. debitam et festinam justitiam in hac parte fieri volentes ut est justum." (*s*)

Formerly the received idea was, that a mandamus would lie only to command the performance of a ministerial duty; but modern cases have gone much further, and it is now the constant practice to grant the writ, to command the performance by any inferior jurisdiction or officer, of any

(*j*) R. v. Greene, 6 A. & E. 548.† S. C. 1 N. & P. 631.†

(*k*) R. v. Bristow, 6 T. R. 170. R. v. Eastern Counties Railway, 10 A. & E. 515.† S. C. 4 P. & D. 48.

(*l*) 3 B. & A. 590; 1 W. Blac. 54. S. C. 1 Wils. 266.

(*m*) R. v. Chester (Ep.), 1 T. R. 404. R. v. Severn Railway, 2 B. & A. 646, 648.

(*n*) Per Buller, J., 1 T. R. 404. R. v. Wheeler, Cas. t. Hard. 99. R. v. Mantacate, 1 W. Blac. 61. S. C. 1 Wils. 283. Com. Dig. tit. "Man." (A).

(*o*) 1 N. & P. 527. S. C. 6 A. & E. 392.† R. v. Peach, 2 Salk. 572.

(*p*) 11 Co. 98 a. Com. Dig. tit. "Man." (A). R. v. Oxenden, 1 Show. 219; 2 Hawk. P. C. 7, 9.

(*q*) Ray. 431. Com. Dig. tit. "Man." (A).

(*r*) The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. R. v. Barker, Burr. 1265. Bac. Abr. tit. "Man." 257. R. v. Oxenden, 1 Show. 263. See post, tit. "Office."

(*s*) R. v. Barker, Burr. 1267. S. C. 1 W. Blac. 352, 552. R. v. Windham, Cowp. 378. Bac. Abr. tit. "Man."

public duty for which there is no specific remedy.(*t*) The duty must be a public one,(*u*) though the value to the public is not scrupulously weighed;(v) it must also be of a *temporal* nature,(*w*) unless jurisdiction be given to the Court by some positive law, as by those acts of Parliament which direct the making and levying of church rates.(*x*)

The duty must also be imperative,(*y*) and not discretionary; there *being numerous cases which clearly establish that a mandamus [*13] cannot issue to enforce the exercise of a discretionary power, except in those cases where such discretion is limited as to time, and such time has passed.(*z*)

It does not lie to command the doing of a particular judicial act, for such an act is clearly discretionary, and therefore it is that the writ, when directed to judicial persons, is general in its terms.(*a*) Thus the quashing of a rate, being a judicial act, the Court of B. R. cannot command the justices, by mandamus, so to do.(*b*.) So where a magistrate had exercised his discretion by refusing to convict on the evidence adduced before him, in support of an information, the Court refused to command him by mandamus to rehear the case, or return the proceedings which had taken place before him.(*c*) So where an appellant against an order of affiliation, moved the Court of Quarter Sessions for a postponement of the appeal, on account of the absence of material witnesses; which being refused, the appellant declined to go into his case, whereupon the order was confirmed; the Court, on motion for a mandamus to the justices to hear the appeal, notwithstanding the production of affidavits tending to show that they had acted unjustly in not granting the postponement, refused to interfere, the matter being one peculiarly within the judicial cognizance and discretion of the magistrates.(*d*) For if it appear that the sessions have exercised a discretion in a matter which properly belongs to

(*t*) *R. v. Fowey* (Mayor), 2 B. & C. 596,† per Best, J. S. C. 4 D. & R. 143.† *R. v. Payn*, 6 A. & E. 399.† S. C. 1 N. & P. 524.† *R. v. Exeter* (Chapter), 12 A. & E. 528.† S. C. 4 P. & D. 252; *Stra.* 159, 536, 1082. *R. v. Bloore*, *Burr.* 1043; 3 B. & Ad. 95.† *R. v. Litchfield* (Ep.), 7 Mod. 218, per Lord Hardwicke, C. J. S. C. Kel. 287. S. C. 2 Barn. 365, 429. *R. v. Derby* (Councillors), 7 A. & E. 421.† S. C. 2 N. & P. 589.† *Carpenter's case*, *Ray.* 439. *R. v. Middlesex* (Archdeacon), 3 A. & E. 615.† S. C. 5 N. & M. 494.† *R. v. Peach*, 2 Salk. 572. *Com. Dig.* tit. "Man." (A).

(*u*) *R. v. England* (Bank), 2 B. & A. 622,† per Bayley, J. *R. v. Dublin* (Dean), *Stra.* 536. *R. v. North Riding* (J.), 2 B. & C. 290.† *R. v. Eastern Counties Railway*, 10 A. & E. 557.† S. C. 4 P. & D. 48.

(*v*) *R. v. Barker*, *Burr.* 1265. *Bac. Abr.* tit. "Man." 257. *R. v. Oxenden*, 1 Show. 263.

(*w*) *Burr.* 1046. *R. v. Dublin* (Dean), *Stra.* 536. (*x*) See tit. "Church."

(*y*) *R. v. Hughes*, 3 A. & E. 429, 432.† S. C. 5 N. & M. 94.†

(*z*) *R. v. Treasury Commissioners*, 4 A. & E. 297.† S. C. 5 N. & M. 589.† And see *R. v. Darlington School*, 12 L. J., N. S. 124, Q. B. Where "a discretion" is given; by it is understood a sound discretion, and according to law, for the Court of B. R. has power to, and will redress things otherwise done: *Estwick v. London* (City), *Styles*, 43.

(*a*) See tit. "Office," (Officers judicial, &c.)

(*b*) *R. v. Middlesex* (J.), 9 A. & E. 546.†

(*c*) *Ex parte The British Patent Company*, 7 D. 614.

(*d*) *Ex parte Beck*, 3 B. & Ad. 704.†

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their jurisdiction, it is an invariable rule that the Court of B. R. does not interfere.(e)

As it lies not to command the exercise of a discretionary or voluntary act, power,(f) or right,(g) of what kind soever; so neither does it lie to influence nor control the exercise of such a discretionary act, power, or [*14] right.(h) Thus, the Court will not grant the writ where a matter is *left to the discretion of an individual, or body of men, which discretion has been exercised, and no ground appears that it has been done wrongfully.(i) So the Court will not interfere with the discretion of an inferior jurisdiction, where it is exercised in accordance with reasonable rules or practice,(j) which principle has been since confirmed by many cases.(h)

It must, however, be clearly understood, that although there may be a discretionary power, yet if it be exercised with manifest injustice, the Court of B. R. is not precluded from commanding its due exercise; the jurisdiction, under such circumstances, being clearly established.(l) Thus, the Quarter Sessions has a discretion to exercise with respect to what is reasonable time for giving a notice of appeal; but the Court of B. R. has also a kind of visitatorial jurisdiction over them in the exercise of such discretionary power, and where the Court thinks that they have not exercised it in a way that ought to be given effect to, it will interfere by mandamus and correct it.(m) So where one is to act according to his discretion, and he will not act, nor even consider the matter, the Court of B. R. will, by mandamus, command him to put himself in motion to do it.(n) Thus, if justices reject an application in the exercise of the discretion vested in them by the Legislature, the Court of B. R. will not interfere; but if they reject it on the ground that they have no power to grant it,

(e) R. v. Norfolk (J.), 1 D. & R. 74.† R. v. Kent (J.), 14 East, 396. See post, tit. "Quarter Sessions."

(f) R. v. London (Mayor), 3 B. & Ad. 254.† R. v. Gloucester (Ep.), 2 B. & Ad. 158.†

(g) R. v. Eye (Bailiffs), 1 B. & C. 85. S. C. 2 D. & R. 172.† See 9 B. & C. 21.†

(h) R. v. North Riding (J.), 2 B. & C. 290.† R. v. Eye (Bailiffs), 1 B. & C. 85.† S. C. 2 D. & R. 172.† Com. Dig. tit. "Man." B. 1. Wright v. Fawcett, Burr. 2041; Ld. Raym. 1244; Fort. 283; R. v. Dr. Askew, Burr. 2186.

(i) R. v. Flockwold Inclosure, 2 Chit. 251.† R. v. Surrey (J.), 2 Show. 74. See Blackborough v. Davis, Comyns, 26. R. v. Kent (J.), 11 East, 230. R. v. Mills, 2 B. & Ad. 578.† Ex parte Blackmore, 1 B. & Ad. 123.† Com. Dig. tit. "Man." (B.) 1. R. v. Monmouthshire (J.), 1 B. & Ad. 895.† R. v. London (Mayor), 3 B. & Ad. 255, 265.† R. v. Fowey (Mayor), 2 B. & C. 588.† R. v. Norfolk (J.), 1 D. & R. 74.†

(j) 3 D. 306.

(k) R. v. Lancashire (J.), 7 B. & C. 691.† R. v. West Riding (J.), 5 B. & Adol. 667.†

(l) Ex parte Becke, 3 B. & Ad. 704.† 10 East, 404. R. v. Lancashire (J.), 7 B. & C. 692.†

(m) R. v. Wilts (J.), 10 East, 404, per Ellenborough, C. J., cited in and commented on in R. v. Monmouthshire (J.), 3 D. 310, 311; but see R. v. West Riding (J.), 5 B. & Ad. 671,† per Parke, J. See tit. "Quarter Sessions" (Appeal).

(n) R. v. North Riding (J.), 2 B. & C. 291.† R. v. Mills, 2 B. & Ad. 578.† R. v. Holbecke, 4 T. R. 779.

the Court will interfere, so far as to set the jurisdiction of the magistrates in motion, by directing them to hear and determine upon the application. *(o)* So although the fact of "*approval*" for offices may be in the *discretion* of a party, yet such party must inquire, as to enable himself to exercise a considerate discretion on the subject, and if he will not so inquire, it is a fit case for the interference of the Court to command further inquiry. *(p)* *There is, therefore, no instance of a mandamus [**15*] to compel an "*approval*," but the Court will, by mandamus, compel an inquiry, and in so doing it does not at all interfere with the exercise of such discretion. *(q)*

The object of the granting of the writ of mandamus being, as before stated, to prevent a failure of justice, *(r)* and to provide an immediate and efficacious remedy, it follows that it will not be granted if, when granted, it would be nugatory, *(s)* in accordance with the maxim, *Lex non cogit ad inutilia*. *(t)* For the principle upon which alone the Court of B. R. exercises this prerogative power is, that a strong political necessity for such remedy exists, and that without it the ends of justice must be defeated. *(u)*

So the Court will refuse it, if it be manifest that it must be vain and fruitless, *(v)* or useless, *(w)* or cannot have a beneficial effect. *(x)* Thus where the writ is sought to *one* magistrate to command him to do that which cannot be done but by *two*. *(y)*

So it will be refused where it is clearly unnecessary, *(z)* as where, by reason of an offer or concession from the other side, the object of the writ is attained. *(a)* So the Court will not grant it to command the performance of anything in future which has always been voluntarily done before. Thus, where trustees under a road act had turned a road through an inclosure, and made the fences at their own expense, and repaired them for several years, a mandamus was refused to command them to continue such repairs. *(b)*

(o) R. v. Kent (J.), 14 East, 396.

(p) R. v. Canterbury (Archbp.), 15 East, 135. R. v. Kent (J.), 14 East, 395. R. v. Gloucester (Ep.), 2 B. & Ad. 158.† See tit. "Lecturehip," post.

(q) 14 East, 399, 400; 15 East, 138, supra. *(r)* Ante, p. 10.

(s) R. v. London (Ep.), 1 Wils. 11. S. C. nom. Lecturer of St. Anne's Stra. 1192. R. v. Exeter (Ep.), 2 East, 466. The Protector v. Craford, Styles, 457. R. v. Pembrokehire (J.), 2 B. & Ad. 391.† R. v. Whitaker, 9 B. & C. 648.† R. v. Milverton (Manor), 3 A. & E. 285.†

(t) R. v. London (Ep.), 12 East, 420, n. *(a)*. See Stra. 763. S. C. Ld. Raym. 1479.

(u) R. v. Fowey (Mayor), 4 D. & R. 134.† S. C. 2 B. & C. 591.† R. v. The Paddington Vestry, 9 B. & C. 456.† R. v. The Eastern Counties Railway, 10 A. & E. 543.† S. C. 4 P. & D. 48.

(v) R. v. Heathcote, 10 Mod. 55, per Eyre, J. R. v. Milverton (Manor), 3 A. & E. 285.†

(w) R. v. Sewers' Commissioners, Stra. 763. S. C. Lord Raym. 1479. R. v. Birmingham Railway, 1 G. & D. 335. S. C. 2 Q. B. 47.†

(x) R. v. Northwich Savings' Bank, 9 A. & E. 729.† S. C. 1 P. & D. 477.

(y) R. v. Sillefant, 5 N. & M. 643.†

(z) R. v. Pitt, 10 A. & E. 372.† S. C. 2 P. & D. 285.

(a) Anon. Loft. 148. See tit. "Application," (Demand and Refusal,) post.

(b) R. v. Llandilo Roads, 2 T. R. 232. Com. Dig. tit. "Man." (B).

So the Court will refuse it if it see that it must ultimately fail.(c) Thus, to a mandamus to make a sewers' rate to reimburse an expeditor, it was returned that the writ was not delivered till the 12th February, and that the commission expired four days afterwards, and [*16] *that therefore the defendants had not time, &c. The Court, on allowing the return, said that a peremptory mandamus could not be granted, it appearing there was then no power in any body to execute the writ.(d)

So the Court will see that the object of the mandamus is for some proper and definite purpose, and not for the gratification of mere curiosity.(e) Thus, it has been held, that a parishioner cannot have a mandamus to inspect churchwardens' and overseers' accounts, under stat. 17 Geo. 2, c. 38, without showing some special ground for wishing to see them, or that there is a grievance for which the writ would be a remedy.(f)

Nor will the Court grant it where it is sought, merely in order to obtain the opinion of the Court on a point of law.(g)

So the Court will not grant the writ if it will introduce confusion and disorder,(h) or be vexatious,(i) or where it is manifestly improper(j) or absurd, as if the writ asked against A., to oblige B. to do an act.(k) So although the Court will, by mandamus, order that to be done which ought to, and may lawfully be done, yet it will not require that to be done which is indecorous in its nature, for non omne quod licet, honestum est,(l) nor which may become the subject of indictment as a public nuisance;(m) nor that which is illegal,(n) or which cannot be legally enforced,(o) it being also a rule of the Roman law that "Quod contra rationem juris [*17] receptum est, non est producendum *ad consequentia.(p) Thus, where the condition of a constables' bond was contrary to the

(c) R. v. Bateman, 4 B. & Ad. 553,† per Lord Denman, C. J.

(d) Stra. 763. S. C. Lord Raym. 1479.

(e) R. v. Staffordshire (J.), 6 A. & E. 90.† S. C. 1 N. & P. 277.†

(f) R. v. Clear, 4 B. & C. 899.† S. C. 7 D. & R. 393.† 6 A. & E. 90, 101.† S. C. 1 N. & P. 277.† See tit. "Books," "Parish," (Inspection), &c.

(g) R. v. Blackwall Railway, 9 D. 558.

(h) R. v. Ely (Ep.), 1 W. Blac. 59. S. C. 1 Wils. 266.

(i) R. v. St. John's Coll. Comb. 238.

(j) R. v. Ely (Ep.), 2 T. R. 336, 337. R. v. Bangor (Overseers), 16 L. J., N. S. 58, M. C.

(k) R. v. Derby (Mayor), 2 Salk. 436. R. v. Ely (Ep.), 1 W. Blac. 56. S. C. 1 Wils. 266. Com. Dig. tit. "Man." (C). Bac. Abr. tit. "Man." (F).

(l) Paulus, lib. 62, Edict. D. 50, 17, 144.

(m) R. v. Coleridge, 1 Chit. 597,† per Abbott, C. J.

(n) In re Lodge, 2 A. & E. 123.† R. v. Liverpool (Customs), 2 M. & S. 223. R. v. London (Customs), 1 M. & S. 259. R. v. St. Pancras, &c., 5 N. & M. 228.† S. C. 3 A. & E. 535.† As to a mandamus for purposes partly legal and partly not, R. v. Thames Commissioners, 5 A. & E. 815,† And see 3 A. & E. 535,† S. C. 5 N. & M. 228,† supra. R. v. Lord Godolphin, 8 A. & E. 347.† S. C. 3 N. & P. 488.† See also R. v. Middlesex (J.), 9 A. & E. 540.† S. C. 1 P. & D. 402.

(o) R. v. Northleach Roads, &c., 5 B. & Ad. 984.† R. v. York (J.), 4 B. & Ad. 342.† S. C. 1 N. & M. 108;† 5 N. & M. 228.† S. C. 3 A. & E. 535,† supra. R. v. Sparrow, 7 Mod. 393. S. C. Stra. 1123. R. v. Stamp Commissioners, 16 L. J., N. S. 75, Q. B.

(p) Paulus, lib. 50. ad Edict. D. 50, 17, 141.

statute in that behalf, the Court would not, by mandamus, command the justices to put it in suit, as they had no authority to enforce the condition,^(q) nor will the Court compel, by mandamus, the doing of an act which is not authorized by law, because the party who is called upon to do it has not resisted doing it by appealing to another tribunal; but as the Court of B. R. is only supplementary to the defects of other jurisdictions, it will enlarge the rule until the appeal be made.^(r) So a mandamus will not be granted to command any person to exercise a jurisdiction which that person is not most clearly and certainly appointed to, and bound by law to exercise;^(s) for the Court will not grant such writ except it clearly see that there is a power lodged in the person against whom the mandamus is prayed.^(t)

Nor will the Court grant it merely for the sake of a return,^(u) nor against a person as an inferior ministerial officer, who obeys a power which he is unable to resist.^(v)

Formerly the Court would not in any case grant the writ where it would subject those executing it to an action.^(w) But since the statute 6 & 7 Vict. c. 67, s. 3, by which it is enacted that no action, suit, or any other proceeding shall be commenced or prosecuted against any person or persons whatsoever, for or by reason of any thing done in obedience to any peremptory writ of mandamus^(x) issued by any Court having authority to issue writs of mandamus: it is apprehended, according to the principle, *cessante causa, cessat effectus*, that the Court is not now so strict in this respect.

The Court has, however, refused the writ in a case where it would have had the effect of subjecting third parties to penalties under the revenue laws, &c.^(y)

**The absence or want of a specific legal remedy.* The writ of mandamus is not a writ grantable of right, but by prerogative,^(z) and, [*18] amongst other things, it is (as before stated)^(a) the absence or want of a specific legal remedy, which gives the Court jurisdiction to dispence it^(b.) It is not

(q) In re Lodge, 2 A. & E. 123.†

(r) R. v. East India Company, 4 M. & S. 283, 284. See tit. "East India Company."

(s) R. v. Ely (Ep.), 1 Wils. 268. S. C. 1 W. Blac. 58. R. v. Middlesex (J.), 9 A. & E. 540.† S. C. 1 P. & D. 402.

(t) 1 W. Blac. 58, *supra*. Briedoak's case, H. 12 Anne, cited in 1 W. Blac. 57.

(u) R. v. Suffolk (J.), 5 N. & M. 144.† S. C. 3 A. & E. 725,† per Patteson, J. R. v. Blackwall Railway, 9 D. 558.

(v) R. v. Middlesex (J.), 9 A. & E. 540.† S. C. 1 P. & D. 402. See post, tit. "Office," (Officer ministerial (inferior)), "Treasurer of County."

(w) R. v. Heathcote, Fort. 290. S. C. 10 Mod. 51, 61. See tit. "Quarter Sessions," (Justices, &c.) R. v. Dyer, 2 A. & E. 606.† S. C. 4 N. & M. 550.† R. v. Middlesex (J.), 1 P. & D. 402. S. C. 9 A. & E. 540.†

(x) See Stat. Appendix.

(y) R. v. Westoe, (Churchwardens), 5 A. & E. 789.† Lawrence v. Hooker, 5 Bing. 6. See post, tit. "Quarter Sessions," (Justices).

(z) Ante, p. 4. (a) Ante, pp. 3, 4, 9.

(b) 3 Bl. Com. 110. R. v. Bristol Dock, 12 East, 429; 2 Selw. N. P., 7th edit., 1062. Wilkins v. Mitchell, 3 Salk. 229. S. C. Ld. Raym. 340. R. v. Windham, Cowp. 378. R. v. Chester (Ep.), 1 T. R. 396. R. v. York (J.), 1 N. & M. 111;† 2 B. & A. 646; 10 A. & E. 544.† S. C. 4 P. & D. 48.

granted to give an easier or more expeditious remedy; but only where there is no other remedy(*bb*), being both legal and specific;*(c)* and so long and uniformly has the Court adhered to this doctrine, and refused to grant, or, if granted quashed, the writ, in cases where there is a specific legal remedy, either at common law or by act of Parliament, that it has become a principle of the law of this subject.*(d)*

This principle applies where there is another and a better remedy,*(e)* or where a specific remedy exists, notwithstanding it has been by circumstances rendered unavailing,*(f)* for it is rare to grant the writ where there is [*19] any other remedy.*(g)* Thus, if a statute prescribe a particular remedy no other remedy can be taken, and therefore, in such a case a mandamus will not lie.*(h)* But if the remedy be not equally convenient and efficacious, the Court will grant the writ, and, therefore, where commissioners were liable for an indictment for not obeying an order of sessions, it did not prevent the interposition of the Court of B. R. by mandamus.*(i)* So it has been held that the usual power given in railway acts to justices to allow the proprietors of land to execute works, &c., on refusal of the company, is not such a specific remedy as will oust the Court of B. R. of

(*bb*) *R. v. Stafford (Marquis)*, 3 T. R. 649. *R. v. Margate Pier*, 3 B. & A. 223. *Bac. Abr. tit. "Man." (D.) (C. 2.)*

(*c*) *R. v. Chester (Ep.)*, 1 T. R. 404. *R. v. St. Katherine's Dock*, 4 B. & Ad. 360.† *S. C. 1 N. & M. 124.†* *R. v. Canterbury (Archbp.)*, 8 East, 219. *R. v. England (Bank)*, 2 Doug. 526. *R. v. Nottingham Water Works*, 1 N. & P. 480.† *S. C. 6 A. & E. 355;†* *W. W. & D. 166.* *R. v. Lincoln's Inn*, 7 D. & R. 368,† per Holroyd, J. *R. v. Worcester Canal*, 1 M. & R. 533. *R. v. Chester (Ep.)*, 1 T. R. 396. *R. v. Bristol Dock*, 12 East, 429. *R. v. Coleridge*, 1 Chit. 592. *R. v. Clear*, 7 D. & R. 393.† *S. C. 4 B. & C. 899.†* *Com. Dig. tit. "Man." (D.)* *R. v. Norwich Railway*, 15 L. J. N. S. 24, Q. B. *S. C. 3 D. & L. 385.*

(*d*) *R. v. Chester (Ep.)*, 1 T. R. 396, 398. *R. v. Stafford (Marquis)*, 3 T. R. 649. *R. v. Barker, Burr. 1265.* *R. v. Eastern Counties Railway*, 10 A. & E. 543.† *S. C. 4 P. & D. 48.* *R. v. Gamble*, 11 A. & E. 72.† *S. C. 3 P. & D. 123.* *R. v. St. Peter's*, 12 A. & E. 512.† *Wilkins v. Mitchell*, 3 Salk. 228. *S. C. Ld. Raym. 348.* *R. v. Wyndham, Cowp. 378.* *R. v. Treasury Lords*, 4 A. & E. 286.† *S. C. 5 N. & M. 589.†* *R. v. Bloer, Burr. 1045.* *R. v. Dursley, (Churchwardens)*, 6 N. & M. 335.† *S. C. 5 A. & E. 10.†* *R. v. Severn Railway*, 2 B. & Ald. 646. *R. v. St Paul (Parish)*, 1 M. & R. 596. *R. v. Colchester*, 2 T. R. 259. *R. v. Canterbury (Archbp.)*, 8 East, 213. *R. v. Dean (Inclosure Comrs.)*, 2 M. & S. 80. *Com. Dig. tit. "Man." (A. B.)* *R. v. Oxenden*, 1 Show. 263. *R. v. Wheeler, Cas. t. Hard. 100, n. (1);* 6 A. & E. 355.† *S. C. 1 N. & P. 480.†* *R. v. Birmingham Canal*, 2 W. Blac. 708; 1 W. Blac. 26, n. (*o*). *R. v. Cambridge (V. C.)*, Burr. 1659. *R. v. Hopkins*, 1 Q. B. 161.† *S. C. 4 P. & D. 550.* *R. v. Victoria Park*, 1 Q. B. 288.† *S. C. 4 P. & D. 639.* *R. v. London Railway*, 15 L. J., N. S. 42, Q. B.

(*e*) *R. v. Gamble*, 11 A. & E. 69.† *S. C. 3 P. & D. 123.* *R. v. Pitt*, 10 A. & E. 272.†

(*f*) *R. v. Margate Pier*, 3 B. & A. 223. See also, 4 P. & D. 642. *S. C. 1 Q. B. 291.†*

(*g*) *Anon.*, 12 Mod. 666, per Holt, C. J. See *R. v. Barker, Burr. 1265; Cas. t. Hard. 99, supra; 3 Bl. Com. 110.* See *infra*, "Indictment."

(*h*) *Stevens v. Evans, Burr. 1157, per Dennison, J.* *R. v. Margate Pier*, 3 B. & A. 223. In re *Gateshead, (J.)* 6 A. & E. 550,† n. (*a*).

(*i*) *R. v. Dean Inclosure*, 2 M. & S. 80; 11 A. & E. 72.† *S. C. 3 P. & D. 123, supra*, where Lord Denman, C. J. said, that it was thought that the decision in 2 B. & A. 646 went quite far enough. *R. v. The Bristol Dock*, 2 Q. B. 64.† *S. C. 1 G. & D. 286.* *R. v. Clarke*, 1 D. & M. 690. *S. C. 5 Q. B. 887;†* 12 A. & E. 530.† *Stra. 1082; 6 East, 356; and 4 A. & E. 286.†* See *post*, 24.

its jurisdiction to command the company, by mandamus, to execute the works.(j)

The above principle prevails only where such other remedy is attainable against that party to whom the mandamus should be directed, not where the purpose is to call forth the exercise of a jurisdiction against one party by mandamus to another.(k)

Whether the taking a private security be a remedy sufficient to negative a mandamus was raised, but not settled.(l)

If, however, there is no such specific legal remedy, the Court will grant the writ.(m) So if it be doubtful whether there be another effectual remedy,(n) or the Court does not clearly see its way to one,(o) the writ will be granted.

The general principle that the Court will not grant the writ where there is any other specific legal remedy must be understood *sub modo*, for if the other remedy be obsolete or inconvenient, as in the case of an assize for an office, the Court will grant the writ.(p) The offices to which such a proceeding is incident are generally such as are created by letters *patent.(q) Upon this point the Court has often said, in answer to [*20] those particular cases in which an assize lies, that though a party has such remedy, yet it is not obsolete, and therefore an exception has been made in those instances,(r) it being discretionary in the Court either to grant or refuse the writ in such cases.(s)

The following is a list, alphabetically arranged, of those legal formulae, the existence of which, as prescribed remedies, bar the dispensation of the writ of mandamus:—

Action. Where there is no specific legal remedy, the Court of B. R. will grant a mandamus to enforce the general law of the land, that thereby justice may be done. But where an action will lie for complete satisfaction equivalent to a specific relief, the Court will not so interfere.(t) Thus, where A. had pulled down a party wall, and thereby destroyed the internal decorations of his next neighbour's house, and afterwards rebuilt

(j) *R. v. Norwich Railway*, 15 L. J., N. S. 24, Q. B. S. C. 3 D. & L. 385.

(k) *Richards v. Dyke*, 3 Q. B. 267,† per Patteson, J.

(l) *R. v. Dursley*, (Churchwardens), 6 N. & M. 337.† S. C. 5 A. & E. 10.†

(m) *R. v. Severn Railway*, 2 B. & Ald. 646. *R. v. Wiltshire Canal*, 5 N. & M. 348.† S. C. 3 A. & E. 483.† *Dr. Askew's case*, Burr. 2186, 2191. *R. v. Blooer*, Bur. 1045. *R. v. Barker*, Burr. 1266. *R. v. Cambridge*, (V. C.) Burr. 1659, 1660.

(n) *R. v. Nottingham Water Works*, 1 N. & P. 480.† S. C. 6 A. & E. 355.† S. C. W. W. & D. 166; 2 B. & Ald. 646.

(o) *R. v. Birmingham*, (Rector) 7 A. & E. 259, 260.†

(p) 1 T. R. 399; 3 T. R. 659, *supra*. Anon. Comb. 347; Stra. 1082, n. (1). *R. v. Oxenden*, 1 Show. 219; Burr. 1265. Bac. Abr. tit. "Man." (C. 2.) See tit. "College," (Master, Restoration.) See also Town Clerk of Oxon's case, Comb. 244. *R. v. Westminster* (Dean), Comb. 244; 3 T. R. 652, per Grose, J.

(q) *R. v. Chester* (Ep.), 1 T. R. 404. *R. v. Severn Railway*, 2 B. & A. 646, 648. See post, tit. "Office."

(r) 3 T. R. 646.

(s) *R. v. Blooer*, Burr. 1043, 1046; 3 T. R. 651, per Kenyon, C. J.

(t) *R. v. England*, (Bank) 2 Doug. 526. *R. v. Chester*, (Ep.) 1 T. R. 396. *R. v.*

the wall, but neglected to replace the decorations, the court held that it was not competent for the person so injured to enforce, by mandamus, the reinstatement of his apartments under stat. 14 Geo. 3, c. 78, s. 41, because his remedy was by action.(u) So the Court has refused a visitor to exercise his visitatorial power over the temporalities of a cathedral church concerning the intermediate profits during the vacancy of a stall, such being a matter proper for an action at law.(v)

It has been decided that a remedy by the following actions is sufficient for the Court to refuse the writ, namely, an action on the case,(w) or special assumpsit: thus it was refused to compel the Bank of England to transfer stock, because such action was the proper and specific remedy,(x)

[*21] so also an action of debt,(y) or those of trover *or detinue.(z) Thus the Court of B. R. will refuse to grant a writ of mandamus to command the delivery up of muniments belonging to one as annexed to his office, against one not claiming them ex officio, for the former may bring detinue or trover for them. So such Court will not command churchwardens to deliver a vestry book to a vestry clerk.(a)

A remedy by *ejectment* is also a bar to the issuing of the writ.(b) And in the case of an office, it is sufficient to bar the dispensation of the writ, if by refusing to pay the *fees* thereof, or by bringing an action against the officer if he take them,(c) the title to the office may be tried.

Amercement. A remedy by amercement has also been held to be a sufficient remedy to discharge the writ. Thus, a rule for a mandamus obtained by the Conservators of the Bedford Level, against persons liable *ratione tenuræ* to repair the banks of the Ouse, was discharged, on a preliminary objection, that by stat. 15 Car. 2, c. 17, the applicants were Commissioners of Sewers, and might, therefore, put in force against the defendants another remedy, namely, amerce those who neglected to repair.(d)

Hopkins, 4 P. & D. 550. S. C. 1 Q. B. 550.† R. v. Severn, Railway, 2 B. & Ald. 648. R. v. Ponsford, 1 D. & L. 116. R. v. Stoke Damerel, 5 A. & E. 589.† S. C. 1 N. & P. 56. Ex parte Robins, 7 D. 566; 1 W. W. & H. 578; 3 Jur. 103. R. v. York, (J.) 1 N. & M. 111.† R. v. Whitstable Fishery, 7 East, 353. R. v. Hull Railway, 8 Jur. 491. S. C. 13 L. J., N. L. 257, Q. B. See tit. "Compensation," (Company.) (u) 1 D. & L. 116 supra. S. C. 12 L. J., N. S. 313, Q. B.

(v) R. v. Dunelmensem, Burr. 567.

(w) Savill's case, Sid. 443. R. v. Chester, (Ep.) 1 T. R. 398; 2 T. R. 188 n. (b). R. v. England, (Bank) 2 Doug. 524. R. v. Dr. Askew, Burr. 2186. R. v. Waterworks, (Nottingham), 1 N. & P. 485.† S. C. 6 A. & E. 355.† But see Stra. 1082. Bac. abr. tit. "Man." C. 2. See tit. "College," (Master.)

(x) Savill's case, Sid. 443; Doug. 526, supra, Com. Dig. tit. "Man." (B.)

(y) R. v. Hull Railway, 6 Q. B. 76.† S. C. 8 Jur. 491. S. C. 13 L. J., N. S. 257, Q. B. See *Infra*, "Fees Withholding," and tit. "Office."

(z) R. v. Hopkins, 1 Q. B. 161.† S. C. 4 P. & D. 550.

(a) Anon., 2 Chit. 255.†

(b) R. v. Chester, (Ep.) 1 Wils. 209, per Law, C. J. R. v. Stainforth Canal, 1 M. & S. 31. R. v. Agardsley, (Manor,) 5 D. 19, and cases there cited.

(c) R. v. Stoke Damerel, (Minister) 5 A. & E. 589.† S. C. 1 N. & P. 56.† 2 H. & W. 346. See post, tit. "Office."

(d) R. v. Gamble 3 P. & D. 122. S. C. 11 A. & E. 72.† And see 5 A. & E. 584. S. C. 1 N. & P. 56.† supra.

Appeal. The Court will not grant the writ if there be a remedy by appeal,(e) exclusively vested in any person or corporation.(f)

Case. Where the sessions have granted a *case* for the Court of B. R. such a course, in general, estops an application for a mandamus to command such sessions to hear.(g)

Distress. Where there is a power to distrain, such remedy must be resorted to, and the Court will refuse to interfere in any case for which *such a proceeding is an available remedy:(h) and where a remedy [*22] as by distress is expressly given by act of Parliament, it seems that the writ will be granted to command the issuing of such distress, notwithstanding there may be a remedy by indictment.(i)

Ecclesiastical Jurisdiction. The Court cannot interpose and grant the writ, where its object is purely Ecclesiastical jurisdiction and remedy; nor correct errors in its proceedings. Thus it lies not to command the admission of a proctor, nor the making of a church-rate, independent of statute; nor as to the mode of burial of dead; the setting-up of bells; the purchase of books, vestments, &c., necessary for divine service,(j) for the Court of B. R., being without judicial knowledge on such subjects, has no jurisdiction.

Equity. Where a legal right exists, it is no answer to an application for a mandamus, to show that there is also a remedy in equity; for when the Court refuses to grant the writ, because there is another specific remedy, it means a specific remedy *at law*.(k)

But if the Court of Chancery have full jurisdiction, as in a matter of title to an estate, and be a fitter tribunal for the investigation, the Court will refuse the writ. Thus, where under stat. 11 Geo. 4 & 1 Wm. 4, c. 60, s. 8, the Court of Chancery, upon a Master's report, made an order

(e) R. v. Appleford, 2 Keb. 864, per Hale, C. J. R. v. Cambridge, (U.) 8 Mod. 150. S. C. Ld. Raym. 1334. S. C. Stra. 557. S. C. Fort. 202. See R. v. East India Company, 4 M. & S. 279. R. v. Weolby, Stra. 1259. R. v. Harrison, 16 L. J., N. S. 33, M. C. R. v. Gray's Inn, 1 Doug. 353. R. v. Lincoln's Inn, 4 B. & C. 855.† Bac. Abr. tit. "Man," C. 2. See tit. "Quarter Sessions."

(f) Gude's, Cr. Pr. 180.

(g) See tit. "Quarter Sessions," (Case.)

(h) R. v. London Railway, 15 L. J., N. S., 42, Q. B. See tit. "Compensation," (Company.) See infra, "Execution."

(i) R. v. Hants, (J.) 1 B. & Ad. 658.† R. v. Robinson, Burr. 799, and cases there cited. See tit. "Distress."

(j) See tits. "Proctor," "Churchrate," "Burial," "Courts Superior;" (Q. B.); Sel. N. P. 1087, 11 edit., and infra, tit. "Equity." R. v. St. Peters, 5 T. R. 364; 4 M. & S. 250. R. v. Taylor, 1 Burn's Ecc. Law, 258. R. v. Coleridge, 2 B. & A. 806, per Abbott, C. J. Lee v. Oxenden, 3 Salk. 229, 4; 1 Salk. 38, 6.

(k) R. v. Stafford, (Marquis) 3 T. R. 651, 652, per Buller, J.; 8 East, 219. R. v. London Assurance Company, 5 B. & A. 901. S. C. 1 D. & R. 510. R. v. Rennett, 2 T. R. 198. R. v. Whitstable Fishery, 7 East, 353. Bac. Abr. tit. "Man." See also Wilkins v. Mitchell, 3 Salk. 229. S. C. Ld. Raym. 348, and note. See post, tit. "Application."

declaring that the heir of W., legal tenant in fee of copyhold premises, could not be found; that W. held as trustee, and that B. was entitled to the equitable fee, and appointing G. trustee to convey or surrender the legal estate; the Court refused to command the lord by mandamus, to accept G.'s surrender, on the ground, assuming the statute to apply to copyholds, that the Court of Chancery could compel the performance of whatever was requisite, and was better able than the Court of B. R. to [*23] regulate the rights of the *parties.(l) So also as the examination of the accounts of a trading company, may be effectually entered into in the Court of Chancery, and as the Court of B. R. is a very unfit tribunal for such purpose, such latter Court will refuse to interfere by mandamus with such a case.(m)

So where it appears by the affidavits on showing cause, that the right respecting which the mandamus is sought, is already the subject of a suit in equity between the parties, the Court will not interfere and grant such writ.(n)

While upon this point, a few words may be advantageously said as to the important subject

Lis pendens. It is a principle of law, that where a matter is in controversy before a competent jurisdiction, the Court of B. R. will not interfere by mandamus.(o) Such a fact will, therefore, found a good return. Thus, where a mandamus was moved for to license one to teach in a school, it was refused, because a caveat in the Spiritual Court was depending. So a mandamus to swear in a deputy registrar of the Consistory Court of York, was refused, because there was a matter in the case in controversy in Chancery;(p) but on the contrary, where the matter is not being discussed before a competent tribunal, such *lis pendens* will not form a good return.(q)

Error. So if a writ of error lie, the Court will not grant a mandamus,(r) as it is a specific legal remedy.

Execution. Where the writ of *fi. fa.*, *ca. sa.*, &c. are applicable as executions, the Court will refuse the writ.(s) Thus, where the prosecutor

(l) *R. v. Pitt*, 10 A. & E. 272.† S. C. 2 P. & D. 385. See tit. "Manor," (Surrender).

(m) *R. v. England (Bank)*, 2 B. & A. 620. See tit. "England," (Bank).

(n) *R. v. Wheeler*, Cas. t. Hard., by Lee, 98. S. C. Cunn. 155.

(o) *R. v. London (Ep.)*, 1 Wils. 11. S. C. Stra. 1192. Anon., 5 Mod. 374. But see 1 T. R. 403, citing Stra. 893-6; Fitz. 194. And see *R. v. Wheeler*, Cas. t. Hard. 100, n. (1); 7 Mod. 218, citing *Raine's case*, 5 Mod. 54. See tits. "Administration," "Will," (*Lis pendens*).

(p) See *Vincent's case*, P. 13, G. 1.

(q) *R. v. Harris*, 1 W. Blac. 450. S. C. Burr. 1420. See tit. "Return."

(r) *Ex parte Morgan*, 2 Chit. 250; 3 A. & E. 721.† And see tit. "Courts Inferior," (New Trial.) (Judgment,) &c., *R. v. Conyngham*, 1 D. & R. 529.† S. C. 5 B. & A. 885.

(s) *R. v. Victoria Park*, 1 Q. B. 288.† S. C. 4 P. & D. 639. *R. v. Hull Railway*, 13 L. J., N. S., Q. B., 257. *Wilkins v. Mitchell*, 2 Salk. 228. S. C. Ld. Raym. 348. See post, tit. "Company," (Execution).

seeks only the payment of debt and costs, for this, an execution by *fi. fa.* is a perfect remedy in its nature, and if in such a case the writ were to be granted, because there happened to be no *chattels seizable, it [*24] would be difficult, on principle, to refuse it, in any case where the sheriff should return *nulla bona*.(t)

Fees, withholding. Where the case is doubtful on the merits, and the applicant can try his right to the office, &c., by maintaining an action for, or withholding the fees thereof, the Court will refuse the writ.(u)

Feigned Issue. A feigned issue when prescribed as the specific legal remedy, is sufficient to prevent the granting of the writ.(v)

Indictment. It is true, as before stated,(w) that a mandamus will issue where there is a legal remedy, in cases where that remedy is not so convenient, complete, or beneficial as a mandamus would enforce, but such doctrine is applied to those cases only where the remedy is not *in its nature* so complete, without reference to any circumstances peculiar to the case in which it might be used.(x) Thus a mandamus has been granted to compel a corporation to reinstate and lay down a railway constructed under the authority of an act of Parliament, although an indictment would have lain for the non-repair; for the only direct effect of an indictment in such a case, would have been the punishment of the defendants by fine, and not the procuration for the prosecutors of the benefit which they sought, and were entitled to.(y) So in all cases where the relief is sought against an artificial person or corporation; for if it be convicted upon an indictment, the Court can only impose a fine upon it, which fine may, it is true, be levied by distress upon its tangible property; yet cases may occur where such its property may be so small, that it may submit to the payment of the fine, and still not do the thing required. In such a case, the remedy is clearly neither so speedy nor so effectual as that by mandamus.(z)

So in cases in which commissioners or other public officers are indicted for not obeying an order of sessions directing them to do certain public acts, as to set out a road, as a public road, an indictment would not be a specific remedy, *i. e.* such a remedy as the case demands; for

(t) 4 P. & D. 642. S. C. 1 Q. B. 291,† R. v. Margate Pier, 3 B. & A. 223.

(u) R. v. Stoke Damerel (Minister), 5 A. & E. 584.† Ante, p. 21.

(v) Bac. Abr. tit. "Man." C. 2. R. v. Street, 8 Mod. 99; 2 Chitt. 255.†

(w) Ante, p. 19.

(x) R. v. Victoria Park, 4 P. & D. 642. S. C. 1 Q. B. 291,† per Denman, C. J. R. v. Nottingham (Waterworks), 6 A. & E. 355.† S. C. 1 N. & P. 480.†

(y) R. v. Severn Railway, 2 B. & A. 646. R. v. Eastern Counties Railway, 10 A. & E. 566.† S. C. 4 P. & D. 48.

(z) R. v. Severn Railway, 2 B. & A. 649. See ante, p. 18, 19.

[*25] an indictment is only a proceeding in poenam for the *past, and not a remedy for the future, and therefore not so efficacious a remedy as mandamus.(a)

Again, the procedure by indictment does not terminate the question, for it may be delayed by certiorari, and the prosecutor is not entitled to costs from the county; whereas a mandamus is a festinum remedium,(b) and the Court has a discretionary power as to the costs by stat. 1 Wm. 4, c. 21, s. 6.(c)

So where an indictment is merely a concurrent remedy, the Court will grant the writ.(d) Thus where a remedy as by distress is expressly given by act of Parliament, it seems that a mandamus will be granted to command the issuing of such distress, notwithstanding there may be a remedy by indictment.(e)

The test, however is, whether the writ or the indictment is the more effectual remedy.(f) Therefore, in all cases where an indictment is a remedy equally convenient, beneficial, and effectual in its nature as a mandamus, or in other words is *the proper remedy*, the Court will not grant such writ. Thus an indictment is the specific remedy to compel the repair of a public road, and for such purpose is a remedy well known to the law, and in constant use.(g) So in many other cases, the remedy by indictment has been treated as a sufficient and a specific remedy. Thus the Court of B. R. will not grant a mandamus to command the treasurer of a county to obey an order of the Court of Quarter Sessions, there being no collusion on the part of such sessions, for the proper remedy in case of his refusal to obey it, is by indictment.(h)

[*26] **Quare Impedit*. It is clearly settled, that if a quare impedit lie, and be the proper remedy, a mandamus does not, and will therefore be refused.(i) Thus it has been refused to command a bishop

(a) 2 B. & A. 649. R. v. Dean Inclosure, 2 M. & S. 80. And see R. v. Jeyes, 5 N. & M. 104.† S. C. 3 A. & E. 416,† where it is stated that Lord Ellenborough—2 M. & S. 80—was the first who settled that an indictment is not always sufficient to withstand a mandamus; 5 A. & E. 811,† n. (b); 10 A. & E. 566.† S. C. 4 P. & D. 48.

(b) See p. 4, n. (b).

(c) 3 A. & E. 421.† See tit. "Costs."

(d) R. v. Severn Railway, the authority of which was doubted in 11 A. & E. 69.† S. C. 3 P. & D. 112; 2 B. & A. 650. R. v. Bristol Dock, 2 Q. B. 64.† S. C. 1 G. & D. 286, 289; 2 M. & S. 84. Ex parte Robins, 7 D. 566. 1 W. W. & H. 578. 3 Jur. 103.

(e) R. v. Hants (J.), 1 B. & Ad. 658.† R. v. Robinson, Burr. 799, and cases there cited. See supra, "Distress."

(f) 2 B. & A. 644; 5 N. & M. 104.† S. C. 3 A. & E. 416.† R. v. Dean Inclosure, 2 M. & S. 84.

(g) See tit. "Highway," (Setting out). R. v. Chester (Ep.), 1 T. R. 404. R. v. Severn Railway, 2 B. & A. 648. R. v. Dean Inclosure, 2 M. & S. 20. R. v. Margate Pier, 3 B. & A. 223. Bac. Abr. tit. "Man."

(h) R. v. Jeyes, 5 N. & M. 101.† S. C. 3 A. & E. 416.† R. v. Bristow, 6 T. R. 168; 1 Chit. 650.† R. v. Johnson, 4 M. & S. 515, cited in R. v. Payn, 1 N. & P. 528.† S. C. 6 A. & E. 392; † 2 M. & S. 20, supra. See tit. "County," (Treasurer).

(i) R. v. Chester (Ep.), 1 T. R. 396, 399, n. (d); Stra. 1082. R. v. Stafford (Marquis), 3 T. R. 649. R. v. St. Peter's Exeter, 12 A. & E. 527.† S. C. 4 P. & D. 252. See tits. "Canons," "Curacy," (Augmented), (Perpetual).

to license the curate of an augmented curacy where there is a cross nomination, because the party has another specific legal remedy by *quare impedit*.(j) So on a commission of charitable use, it was agreed between the lord of the manor of A. and the inhabitants of W. within the manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the chapel of W., to be nominated by a majority of the inhabitants, and to be allowed by the said lord, and by him presented to the ordinary for a license to preach; the usage of nominating, &c. had been pursuant to the agreement; the lord having refused to allow and present the nominee of a majority of the inhabitants, the latter prayed a *mandamus*, which the Court of B. R. refused, holding that their right was either a mere trust, and then their remedy was in equity, or a legal right, and properly the subject of a *quare impedit*.(k) In one case, however, the writ was granted to admit to a canonry; but it does not appear that there was a disturbance of the right of patronage.(l)

Quo warranto. The Court will refuse to grant the writ of *mandamus* if it appear that the applicant has a remedy by information in the nature of a *quo warranto*. Thus a rule for a *mandamus* to admit a recorder was refused, because it appeared there was a recorder *de facto*, and therefore that the applicant had such a remedy.(m) For the consequence of granting a rule in such a case, would be that a second person would be admitted to an office already filled by another, both claiming to be duly elected.(n) So where persons declared to be duly elected municipal officers have accepted the office, and made the proper *declaration; it then [*27] being *prima facie* full, they can only be removed by a *quo warranto* information; therefore a *mandamus* does not lie to admit other candidates who are alleged to have had a majority of votes,(o) unless such election be clearly void.(p) So if a party have been ousted of an office by the election of another person to that office (the election not being merely colourable,) but *prima facie fide bona fide*, his remedy is not by *mandamus*, but by an information in the nature of a *quo warranto*.(q) For if the election be merely doubtful, and therefore fit to be tried upon an

(j) 1 T. R. 396, *supra*. Com. Dig. tit. "Man." (B.) Bac. Abr. tit. "Man." C. 2. See tit. "Curacy," (Augmented).

(k) R. v. Stafford (Marquis), 3 T. R. 646. See tit. "Trust."

(l) Clarke v. Sarum (Ep.), Stra. 1082. The authority of this case is questioned in a note to the 3rd edition, and also denied in *Bowell v. Milbank*, 1 T. R. 399, n.

(d) R. v. Chester (Ep.), 1 T. R. 306, and *Powell v. Kilburn*, 3 Wils. 355. But see Bac. Abr. tit. "Man." C. 2. See tit. "Canons."

(m) R. v. Colechester (Mayor), 2 T. R. 259. R. v. Winchester (Mayor), 7 A. & E. 220.† S. C. 2 N. & P. 274. R. v. Oxford (Mayor), 1 N. & P. 479.† S. C. 6 A. & E. 467.† R. v. Chester (Ep.), 1 M. & S. 102. R. v. Atwood, 4 B. & Ad. 481, 482,† and cases there cited. Bac. Abr. tit. "Man." C. 2. See tit. "Recorder."

(n) R. v. Bedford Level (Corp.), 6 East, 360.

(o) 2 N. & P. 274. S. C. 7 A. & E. 215,† *supra*. R. v. Derby (Councillors), 2 N. & P. 589. S. C. 7 A. & E. 419.†

(p) See tit. "Office," (Election).

(q) R. v. Oxford (Mayor), 1 N. & P. 479.† S. C. 6 A. & E. 349.† per Coleridge, J.; 4 T. R. 699; 3 A. & E. 467,† *supra*. See tit. "Office" (Election).

information in the nature of a quo warranto, the Court ought not, nor will it grant a mandamus; but if it be a mere colourable election, and clearly void, it ought to and will grant it.(*r*)

There are, however, numerous cases in which the Court has granted a mandamus, notwithstanding a remedy existed by quo warranto information.(*s*) Thus, if one be ousted from an office and another elected in his stead, and such election be merely colourable, a mandamus will go to permit the ousted party to exercise his office; but as the law holds such colourable election to be void, the mandamus will *not be to restore* but to permit the exercise of the office.(*t*)

The Court will however, in some cases, grant a mandamus, although the title of the officer to whom the mandamus is directed is questioned by the pendency of an information in the nature of a quo warranto, for it may be collusive; but if the prosecutor of the quo warranto be also the applicant for the mandamus, it is otherwise.(*u*) It seems also, that it has been considered that a quo warranto information and a mandamus may be concurrent remedies.(*v*)

If, however, a quo warranto does not lie, then mandamus will.(*w*)

Quality of Prosecutor's Right to the Writ.

The prosecutor must be clothed with a clear legal(*x*) and equitable [*28] right to something which is properly the subject of the writ,(*y*) as a legal right by virtue of an act of Parliament.(*z*) But whatever the quality of the right may be, the Court will see it clearly substantiated by affidavits before they will grant the writ,(*a*) and if they are not

(*r*) *R. v. Banks*, Burr. 1454. *R. v. Colchester (Mayor)*, 2 T. R. 260. See tit. "Office," (Election).

(*s*) *R. v. Stoke Newington (Minister)*, 1 N. & P. 57.† *S. C.* 5 A. & E. 584.†

(*t*) *R. v. Oxford*, 6 A. & E. 349.† *S. C.* 1 N. & P. 474.† and cases there cited. *R. v. Colchester (Mayor)*, 2 T. R. 260.

(*u*) *R. v. Grampond (Mayor)*, 6 T. R. 301, 302, and see *R. v. Dr. Hay*, Burr. 2295.

(*v*) *R. v. Bedford Level*, 6 East, 367, per Lawrence, J., and see 2 B. & A. 649. See "Indictment," p. 25.

(*w*) 3 A. & E. 472.† supra.

(*x*) *R. v. Nottingham Water Works*, 1 N. & P. 480.† *S. C.* 6 A. & E. 355.† *W. v. D.* 166. *R. v. Lincoln's Inn*, 7 D. & R. 368.† per Holroyd, J. *R. v. Worcester Canal*, 1 M. & R. 533. *R. v. Chester (Ep.)*, 1 T. R. 396. *R. v. Bristol Dock*, 12 East, 429. *R. v. Coleridge*, 1 Chit. 592.† *R. v. Clear*, 7 D. & R. 393.† *S. C.* 4 B. & C. 899.† *Com. Dig.* tit. "Man." (D). *R. v. Jotham*, 3 T. R. 575. *R. v. Bridgewater*, 1 N. & P. 466.† *S. C.* 6 A. & E. 339.† *R. v. Stafford (Marquis)*, 3 T. R. 651. *R. v. London Assurance Company*, 5 B. & A. 901.† *R. v. Portsmouth (Mayor)*, 3 B. & C. 152.† *S. C.* 4 D. & R. 767.† *R. v. West Looe (Mayor)*, 3 B. & C. 677.† *S. C.* 5 D. & R. 590.† *R. v. Barnard's Inn*, 5 A. & E. 24.† *R. v. Canterbury (Archbp.)*, 8 East, 216. *Ex parte King*, 7 East, 90. *R. v. North Riding (J.)*, 2 B. & C. 290.† *R. v. Eastern Counties Railway*, 19 A. & E. 557.† *S. C.* 4 P. & D. 48. As to the applicants for the writ, see tit. "Application," post.

(*y*) *R. v. Wheeler*, Cas. t. Hard. 160. *S. C.* Cunn. 155. *R. v. Stafford (Marquis)*, 3 T. R. 646. *R. v. Chester (Ep.)*, 1 T. R. 396. *R. v. Chester (Ep.)*, 1 W. Bl. 25, n.

(*z*) *R. v. Ottery St. Mary*, 3 G. & D. 383. *S. C.* 4 Q. B. 157.† *R. v. West Riding (J.)*, 3 N. & M. 88.† *Ex parte Ricketts*, 4 A. & E. 999.† *S. C.* 6 N. & M. 523.†

(*a*) *R. v. Treasury Lords*, 4 A. & E. 981.† See tit. "Act of Parliament."

(*a*) *R. v. Heyward*, 1 M. & S. 628; see post, tit. "Application," (Affidavits).

so satisfied, they will refuse it.(b) Thus where a charter does not require the members of a corporation to be resident, the Court will not by mandamus command such corporation to meet and consider the propriety of removing from their offices the non-resident corporators, unless their absence has been productive of some serious inconvenience.(c) So where a decree in Chancery had, in 1741, declared the right of voting to be in those inhabitants who paid rates and assessments; and the usage since that decree had been in accordance with it; an election having been made by such inhabitants, at which the votes of non-rated inhabitants were tendered and refused, the Court refused to grant a mandamus for a new election, as the parties applying for it had made out no case to show that the term "inhabitants" used in the charter had a wider signification.(d)

The prosecutor must fulfil every legal requirement necessary to the obtaining of such writ.(e)

Of those subject to the Writ.

*The applicant must not only show that he is both legally and equitably entitled to some right properly the subject of the writ, [*29] but must show that it is legally demandable from the person to whom such writ must be directed,(f) otherwise the Court will refuse to interfere; and although the Court is aware of the extreme inconvenience of obliging a prosecutor to seek his relief in a Court of Equity; yet it will refuse the writ if it entertain a doubt whether the defendants have legal capacity to fulfil the writ.(g)

2nd. THE SUBJECTS, *alphabetically arranged, as to which the Writ has been either granted or denied.*

The following is an alphabetical, and, it is presumed, a complete series, of the subjects which have from time to time been decided by the Court of B. R., to be either within or without the jurisdiction of the writ of mandamus. It is trusted that the series will be found useful to the practitioner, as thereby he will be enabled to ascertain at once, how far

(b) 9 A. & E. 339.† n. (a)

(c) R. v. Portsmouth (Mayor), 3 B. & C. 152.† S. C. 4 D. & R. 767.†

(d) R. v. Sandford (Governors), 1 N. & P. 328.† See tit. "Charter."

(e) R. v. Bond, 6 A. & E. 905.† R. v. Bath (Recorder), 9 A. & E. 874.† S. C. 1 P. & D. 622. R. v. Deptford Pier, 1 P. & D. 128. S. C. 8 A. & E. 910.† see post, tit. "Application."

(f) Ante, p. 27. R. v. Liverpool, (Customs) 2 M. & S. 223. R. v. Heywood, 1 M. & S. 623. R. v. Exeter, (Ep.) 2 East, 464. R. v. Denbighshire, (J.) 14 East, 284. R. v. London, (Ep.) 1 Wils. 11. R. v. Field, &c., 4 Tr. R. 125. R. v. London, (Ep.) 1 T. R. 331. R. v. Lincoln's Inn, 4 B. & C. 859.† S. C. 7 D. & R. 365.† R. v. London, (Ep.) 12 East, 420; Lord Raym. 1205. In Re Baron De Bode, 6 D. 789. R. v. Kent, (J.) 9 B. & C. 287.† R. v. Dolgelly Union, 8 A. & E. 561.† S. C. 3 N. & P. 542. R. v. Patrick, 2 Keb. 172, per Keeling, C. J. See further as to those against whom the writ may be obtained, post, "Application."

(g) R. v. Ld. Godolphin, 8 A. & E. 347.† S. C. N. & P. 488. See also R. v. Middlesex, (J.) 9 A. & E. 540.† S. C. 1 P. & D. 402. See post, tit. "Application."

the Court has dispensed or refused the writ, as to any subject respecting which the interference of the Court has been asked :

ABBOT.] *Restoration*.—It does not lie to restore an abbot.(a) In fact it has never been granted for an abbot, because he was an ecclesiastical corporation, and had a proper visitor, whose office has now devolved upon the archbishop.(b)

[*30] *It seems, however, that formerly the writ would, in such a case, have been granted on account of the undefined jurisdiction of the writ.(c)

ABSOLUTION.] It has been granted to commanded a bishop to absolve an excommunicated person.(d) Thus where one excommunicated wished to conform to the orders of the Church and to obedience, but the ecclesiastical Court refused to receive him, the Court of B. R. granted him this writ, commanding such inferior Court to assail him.(e)

ACCOUNTS, &c.] See titles *Bank of England* ; *Books, &c.* ; *Churchwarden (accounts)* ; *Company (accounts)* ; *Constable (accounts)* ; *Overseer (accounts)*.

ACT OF PARLIAMENT.] It is a general rule, that wherever an act of Parliament gives power to, or imposes an obligation on, a particular person, to do some particular act or duty, and provides no specific legal remedy on non-performance, the Court of B. R. will, in order to prevent a failure of justice, grant *ex debito justitiæ*, a mandamus to command the doing of such act or duty.(f) But the Court will not command as to the manner in which such act shall be done.(g)

So it lies to command the performance of an act or duty prescribed by a local act, whatever its kind or nature may be, unless, as before stated, it be the subject of a legal remedy.(h)

It lies also to command the due execution of the powers of a local and

(a) R. v. London Waterworks, 1 Lev. 123, per Wyndham, J. See tits. "Monk," "Knights Templar," "Prior."

(b) See Leigh's case, 3 Mod. 334. S. C. nom. R. v. Lee, &c., 1 Show. 252, per Holt, C. J. See post, tit. "Visitor."

(c) Middleton's case, 1 Sid. 169, per Windham, J. See post, tit. "Monk."

(d) Anon., 2 Rolle, 197. Com. Dig. tit. "Man." (A.) See post, tit. "Bishop."

(e) Per Montague, C. J. Parish, &c., St. Balaunce case, Pal. 51. See Nat. Brev. de Cautione admittenda. See also R. v. Patrick, 2 Keb. 165, per Moreton, J., and 2 Inst. 623, for refusing to assail; 2 Keb. 168, per Twisd. J.; Dr. & St. 118.

(f) Bac. Abr. tit. "Man." (D.). R. v. Jeyes, 3 A. & E. 421,† R. v. London, (Ep.) 1 Wils. 13. S. C. Stra. 1192. And see R. v. Middlesex, (J.) 1 Wils. 125. R. v. Cumberland, (J.) 1 M. & S. 196. R. v. Derbyshire, (J.) 4 T. R. 488. R. v. St. Pancras, 6 Jur. 391; Bull. N. P. 199; Cas. t. Hard. 99; Burr. 2159. See tits. "Arbitrator," "Church," (Rate in nature of Church-rate.)

(g) Ante, n. (f).

(h) R. v. Paddington Vestry, 9 B. & C. 456,† R. v. Eastern Counties Railway, 18 A. & E. 513,† S. C. 4 P. & D. 48. R. v. St. Pancras, 3 A. & E. 535,† S. C. 5 N. & M. 222,† R. v. Bristol Dock, 1 G. & D. 291. S. C. 2 Q. B. 64,† R. v. York Railway, 14 L. J., N. S. 277, Q. B., (to make watering places for cattle.) See 3 Jur. 1030.

personal act, which cannot be compelled by any specific legal remedy(*i*) as to hear the adjournment of an appeal.

In these and the like cases, however, the Court is very astute in seeing to its jurisdiction(*j*) because as on the one hand much mischief might ensue if the Court should improvidently enjoin the performance of things impracticable or improper, so on the other there is no higher duty cast upon the* Court of B. R. than to exercise a vigilant control over persons [31] entrusted with large and extensive powers for public purposes, and to enforce within reasonable bounds, the exercise of such powers in compliance with such purposes, and the more so where there is no specific legal remedy(*k*)

They who come for and obtain acts of Parliament, such as railway acts, do in effect undertake that they will do and submit to whatever the Legislature empowers and commands them to do, that they will do nothing else; and that they will do and forbear all that they are thereby required to do and forbear, as well with reference to the interests of the public as to the interests of individuals(*l*)

There are also many cases in which a mandamus is granted, as where a thing necessary for the public safety is to be done under an act of Parliament(*m*)

The Court has not, however, any power to grant a writ to supply a casus omissus from an act of Parliament(*n*)

An act of Parliament, the object and effect of which is merely to confirm private statutes, will not warrant a mandamus(*o*)

The Court will, by mandamus, command an inferior Court to exercise all jurisdictions conferred upon it by act of Parliament. Thus where the Court of Quarter Sessions decided not to rate the wages of millers on the erroneous supposition that the act giving it jurisdiction merely authorised it to rate the wages of husbandmen, the writ was granted(*p*) So also the Court will grant a mandamus where justices misread a compensation clause in a local act as to the extent of costs to be allowed, or any other essential matter(*q*)

And the Court will grant the writ, &c., for the performance of such

(*i*) R. Kent (J.), 6 M. & S. 258 See post, tit. "Quarter Sessions," (Appeal.)

(*j*) Ante, p. 10. R. v. Greene, 6 A. & E. 549.† S. C. 1 N. & P. 631.† R. v. Heywood, 1 M. & S. 524. See post, tit. "Application."

(*k*) R. v. Eastern Counties Railway 10 A. & E. 546.† S. C. 4 P. & D. 48. See tit. "Railways," post.

(*l*) 2 P. & D. 656. Blakemore v. Glamorganshire Canal, 1 M. & K. 154. R. v. Cumberworth, 3 B. & Ad. 108.† Lee v. Milner, 2 M. & W. 824.*

(*m*) R. v. Ouze Bank Commissioners, 3 A. & E. 544.† R. v. Gamble, 11 A. & E. 556.† See post, tit. "Drainage."

(*n*) Bagg's case, 11 Co. 93 b. R. v. Radnorshire (J.), 15 L. J., N. S. 151, M. C.

(*o*) R. v. Chester, (Ep.) M. 9 Geo. 2; 1 W. Blac. 24; S. C. 1 Wils. 206. R. v. Bugg, M. 9 Geo. 2, there cited.

(*p*) R. v. Kent (J.), 14 East, 395, also cited in R. v. Treasury Lords, 2 P. & D. 504. See tit. "Court," (Inferior,) post.

(*q*) R. v. York (J.), 1 A. & E. 828.† S. C. 3 N. & M. 685, cited in R. v. Treasury Lords 2 P. & D. 504. See tit. "Compensation," post.

power or duty, although the act imposes a penalty on non-performance. Thus as upon the stat. 11 Geo. 1, c. 18, so upon the act of Parliament that mayors of corporations should attend at corporate assemblies, a mandamus is always granted, notwithstanding the penalty.^(r) So the writ will be granted to command justices to hear an information properly laid under a penal statute.^(s)

But the Court will not command the doing of an act which interferes [*32] *with a statutory protection,^(t) nor to command the execution of one particular part only of a power given by an act of Parliament.^(u)

— *Application.*—Those for whose benefit a statute is made, although not specifically named, should be the parties, applicants for the mandamus.^(v) Thus the Court granted a mandamus to appoint overseers for a hamlet upon an affidavit that there were poor belonging to it, notwithstanding that the stat. 13 & 14 Car. 2, c. 12, does not empower any individual to enforce the appointment.^(w)

The application to enforce an act of Parliament is, for the most part, *ex debito justitiæ*.^(x) But the Court of B. R. will not grant a mandamus to command commissioners appointed under a local act, neither on the application of a company ordering them to perform a contract made with the company, nor on the application of certain rate payers ordering them to provide for the execution of the powers under the act; where no inconvenience is being suffered by the inhabitants.^(y)

It is, however, no ground for refusing the writ, that the period of time referred to in the powers of the act of Parliament under which the defendant should have acted, has expired.^(z)

ADMINISTRATION, LETTERS OF]. This title is arranged as follows:—

When granted	-	-	-	32	Returns, Lis pendens	-	-	-	35
Durante minori ætate	-	-	-	35	Administration Bond	-	-	-	36
Cum testamento annexo	-	-	-	35	Production, &c.	-	-	-	36
Returns	-	-	-	35	Distribution	-	-	-	36

—], *when granted.*—The Court of B. R. had always been in the constant habit, in cases of complete intestacy, of commanding by mandamus, the due granting of letters of administration.^(a) But the Court

(r) R. v. Everet, Cas. t. Hard. 261.

(s) Ex parte Williams, 4 Jur. 171. R. v. Jukes, 8 T. R. 625. See tit. "Quarter Sessions," (Justices.)

(t) R. v. Middlesex, (J.) 9 A. & E. 540.† S. C. 1 P. & D. 402. R. v. Northwich Saving's Bank, 9 A. & E. 729.† S. C. 1 P. & D. 477.

(u) R. v. Birmingham Canal, 2 W. Blac. 708.

(v) R. v. Cumberland, 1 M. & S. 193.

(w) 1 M. & S. 193. R. v. Westmorland, 1 Wils. 133. R. v. Kent, (J.) 14, East, 395.

(x) Ante, p. 30, n. (f), and post, tit. "Application."

(y) R. v. Cheltenham, (Commissioners) 4 Jur. 1060. See post, tit. "Contract."

(z) 8 A. & E. 911;† and see tit. "Compensation," (Company, Application.)

(a) 3 Bl. Com. 111. Bac. Abr. tit. "Man." (D.) Offley v. Best, 2 Keb. 243, cit-

will not thus interfere except where the party applying is entitled to the letters by act of Parliament, or where there has been unreasonable delay in the *proceedings,^(b) together with a refusal by the Spiritual Court to grant them.^(c) But when either of these circumstances [*33] occurs, the Court of B. R. will command the granting of the letters to those entitled to have them, as to the next of kin,^(d) on a suggestion, as before stated, of intestacy.^(e)

And it will be granted as well to command the ordinary^(f) as the prerogative or other Ecclesiastical Court.^(g)

But as the ordinary, &c., has in some cases the proper right and discretion of judging of the fitness of the person to whom he will grant administration, and as such person is only to be considered a trustee of the assets without having any profitable interest,^(h) the mandatory part of the writ in those cases merely commands a grant of letters of administration *according to the statute*. Thus, as the statute enacts that it must be granted to the widow or next of kin, so it follows that it may be granted to either in the discretion of the ordinary, &c. But if the widow renounce,⁽ⁱ⁾ or there be no widow, then the next of kin are entitled *ex debito justitiæ*,^(j) and on being refused, &c., may have a mandamus.^(k) It therefore follows that the Court of B. R. will not command the grant, &c., to a particular person,^(l) as to A. and B. next of kin, &c., as the effect of

ing *Freche's case*, H., 22 Car. 1. *Fenwicke v. Agar*, M. 1658, where a mandamus for such purpose was granted as it is said *non voce*; also citing *The Countess of Berkshire's case*. Anon., Holt, 656; 5 Mod. 374; 1 Salk. 250, 251. And see S. C. 2 Keb. 393. S. C. 1 Lev. 187. *Dunkin v. Brown*, 3 Keb. 350; *Williams, Exors.* 335. Trem. Pl. Cor. 501, where see form of writ. See tit. "Will."

(b) Anon., 2 Barn. 348.

(c) *Raine's Case*, Ld. Raym. 262. See tit. "Application," (Demand and Refusal).

(d) Anon., 2 Sid. 114. *Dunkin's case*, 3 Keb. 348; *Jones*, 225, 226. *Pierce v. Perks*, 1 Sid. 281. *Luskins v. Carver*, Sty. 8. Com. Dig. tit. "Man." (A.); 1 Sid. 372. S. C. 2 Keb. 243, 393. S. C. 1 Lev. 187, *supra*. R. v. Dr. Hay, 1 W. Blac. 640. R. v. Horsley, 8 East, 405. *Williams, Exors.* 335. R. v. Patrick, 2 Keb. 172, per Keeling C. J.

(e) R. v. Raines, 12 Mod. 136. S. C. 12 Mod. 205. S. C. Salk. 299. S. C. Carth. 457. S. C. 3 Salk. 162, 233. S. C. Holt, 310. S. C. Ld. Raym. 361. S. C. 3 P. Wms. 337, n. (b); Fitz. 125; 3 Atk. 566; 2 Atk. 126. Bac. Abr. tit. "Man." (D.)

(f) *Boon's case*, cited in R. v. Patrick, 2 Keb. 66. And see S. C. 2 Keb. 165, per Moreton, J. R. v. London (Ep.), 1 Wils. 13. *Pierce v. Perks*, 1 Sid. 281. Anon., 2 Sid. 114; *Jones*, 225, 226. *Ryley's Plac. Parl.* 553.

(g) R. v. Raines, 12 Mod. 136, and cases there cited. *Gray v. Tench*, Comb. 454. *Lord Suffolk's case*, Cas. t. Hard. 8. S. C. 2 Kel. 156, pl. 128. See tit. "Courts, Inferior."

(h) R. v. Dr. Bettesworth, 1 Bar. 425. See ante, pp. 12, 13.

(i) Anon., Stra. 552, cited in 8 East, 408, per Lawrence, J. *Lord Suffolk's case*, Cas. t. Hard. 8. S. C. 2 Kel. 156, pl. 128. And see *Lord Londonderry's case*, Stra. 857. S. C. 1 Barn. 280; Andr. 366. Anon., Freem. 372. R. v. Bettesworth, 1 Barn. 424, 425. R. v. Bettesworth, 2 Barn. 420. R. v. Bettesworth, Wm. Kely, 139, 156. Wms. Exors. 335, 336. *Gray v. Tench*, Comb. 454.

(j) R. v. Dr. Hay, 1 W. Blac. 640. And see *Lovegrove v. Bethell*, 1 W. Blac. 668; Stra. 552, n. (1).

(k) R. v. Horsley (Inhabs.), 8 East, 408, per Ellenborough, C. J. Anon., Stra. 552. *Fawtry v. Fawtry*, Salk. 36. *Blackborough v. Davis*, Salk. 38. S. C. Ld. Raym. 684. S. C. Com. 96. S. C. 1 P. Wms. 41. S. C. 12 Mod. 615.

(l) Anon., 7 Mod. 140. *Stewart v. Eddy*, 7 Mod. 143; Ld. Raym. 262. Anon., Stra. 552. Com. Dig. tit. "Man," (A).

such a course would be to take from the ordinary, &c., the power and discretion of judging which degree of relation is next of kin, or of the priority of classes, inter se, and this in cases where the subject-matter does not [*34] belong to the temporal Courts.(*m*) So for the *same reason the writ must not command the letters, &c., to be granted to the widow.(*n*) For, as before shown, they may be granted either to the widow or to the next of kin.(*o*) Neither will the Court command it to be granted to two next of kin.(*p*)

But the Court will grant a mandamus "to J. S. or next of kin, according to the statute."(*q*) So it lies to command a grant of administration to the husband of his deceased wife's estate;(*r*) and this though she has made a will of property devised to her after marriage, with express power given by the testator for her so to do, without her husband's interference—but otherwise where he has resigned or parted with all interest in his wife's fortune.(*s*) So it lies to command a grant, &c. to the father in preference to the sister of the intestate.(*t*)

After administration has been granted to one, the Court will not command it to be granted to another, whether of the same or of a nearer degree of kinship, as such a course would not only interfere with the discretion of the ordinary,(*u*) and because the letters, though granted to an improper person, are not void, but merely voidable, but also because there is a remedy by citation by which a repeal of the letters may be obtained.(*v*)

So where the applicant has a right to letters, &c., by the rules only of the Ecclesiastical Court, the Court of B. R. will not command the granting of them;(*w*) and, in such a case will allow the Ecclesiastical Court to impose reasonable terms, as requiring a return to a commission of appraise-

(*m*) Blackborough v. Davis, 1 P. Wms. 45, 46, per Sir B. Shower.

(*n*) Anon., 11 Mod. 137. Blackborough v. Davies, Salk. 38. S. C. Ld. Raym. 684. S. C. Com. Rep. 96. S. C. 1 P. Wms. 41. S. C. 12 Mod. 615. Smith's case, Stra. 892. Barker's case, Andr. 24. Stewart v. Eddy, 7 Mod. 143. Anon., Stra. 552. Pierce v. Perks, 1 Sid. 281. Offley v. Best, 1 Sid. 372. S. C. 2 Keb. 243, 393. S. C. 1 Lev. 187. And see Luskins v. Carver, Sty. 7, 8. Fortre v. Fortre, 1 Show. 351. S. C. Salk. 36. S. C. Holt, 42.

(*o*) Sand's case. Fortre v. Fortre, 1 Show. 351; and in Amhurst's case, 1 Vent. 188.

(*p*) 1 P. Wms. 45. S. C. 1 Salk. 251, supra.

(*q*) Anon., 7 Mod. 140. Steward v. Eddy, 7 Mod. 143.

(*r*) Fortre v. Fortre, 1 Show. 351. S. C. Salk. 36. S. C. Holt, 42. R. v. Bettesworth, Stra. 891, 1118; Wms. Exors. 335.

(*s*) R. v. Bettesworth, 7 Mod. 313. S. C. Stra. 891. S. C. 1 Barn. 424. S. C. Stra. 956, 1111, 1118. Brook v. Turner, 1 Mod. 211. Com. Dig. tit. "Man." (D. 4).

(*t*) Coplestone v. Coplestone, 2 Show. 307. 3 Co. 40; Prec. Ch. 527. Blackborough v. Davis, 1 Salk. 38; 2 Vern. 125.

(*u*) Blackborough v. Davis, 1 Com. Rep. 96. S. C. 2 Com. 108. S. C. 1 Salk. 38. S. C. 1 Salk. 251. S. C. 12 Mod. 615. S. C. Holt, 43. S. C. Ld. Raym. 648. S. C. 1 P. Wms. 41, 45. 3 Bac. Abr. 381. Com. Dig. tit. "Man." (B.) But see Gray v. Tench, Comb. 454, contra.

(*v*) Blackborough v. Davis, 1 Com. 96. S. C. 2 Com. 108. S. C. 1 P. Wms. 42. Allen v. Dundas, 3 T. R. 128. But see Anon., 1 Freem. 372; Wms. Exors. 335, n. (*a*).

(*w*) Anon., 2 Barn. 334, 348, 361.

ment, &c., the Judge, &c., having power to object to the security which any person shall offer who prays administration.(x)

So the Court of B. R. will not command the Spiritual Court to put their seal to letters of administration, which have been decreed to the prosecutor, *the Court saying it could not oblige the Spiritual Court [* 35] to execute its sentences.(y)

—,] *durante minori ætate*.—As the writ of mandamus is granted to oblige the doing of justice to the party who sues out the writ, it does not lie to command a grant of letters, &c., *durante minori ætate*, it being discretionary with the ordinary to whom he shall grant it (z) nor will it, for the same reason, go to grant administration, with the will annexed, during minority, neither to a certain person, nor generally.(a)

—,] *cum testamento annexo*.—But the Court of B. R. has, by mandamus, commanded a grant of letters, &c., *cum testamento annexo*, to the next of kin;(b) yet the Court will not command a grant, &c., to the residuary legatee, because not within the statute.

—,] *Return, lis pendens*.—A return of *lis pendens*, is no answer to the writ, if the consanguinity be not denied;(c) but if it be denied, the return will be good.(d) So a return is good, which alleges, that the defendant had admitted in a suit, that by deed before marriage, he had agreed that his wife might make a will, which she did, and that suit was depending for administration, with such will annexed, for the defendant's (husband's) consent appears.(e) So a return that administration is already committed, and that there is no *lis pendens*, is good;(f) or that there is a will in litigation,(g) and if such a fact appear by affidavit, the Court

(x) Anon., 2 Barn. 334, 348, citing Lord Londonderry's case, Stra. S. C. 1 Barn. 280. Anon., 2 Barn. 361. See ante, pp. 12, 13; and see tit. "Discretion."

(y) Tremain's case, Comb. 158. See tit. "Seal," (Affixing).

(z) See Ante, pp. 12, 13. Smith's case, Stra. 892. S. C. Anon., 1 Barn. 370, 425. S. C. Andr. 24. Com. Dig. tit. "Man." (B.) Barker's case, Andr. 24, 366; Fitzg. 163. Bac. Abr. tit. "Man." (D.) But see contra, 1 Barn. 370, per C. J.

(a) R. v. Bettesworth, Stra. 956. S. C. 1 Barn. 234. S. C. 2 Kel. 139. Barker's case, M. 11 Geo. 2 Andr. 24. Com. Dig. tit. "Man." (B.) Wms., Exors. 374. Bac. Abr. tit. "Man." (D.)

(b) Luskins v. Carver, Sty. 7, 8, citing Countess of Barkshire's case, H., 20 Jac.; St. Burien's case. Dunkin v. Mun, Raym. 235. But see contra, R. v. Bettesworth. W. Kel. 139, 156; and Anon., 2 Barn. 361, per Page, J. S. C. Stra. 956; Wms. Exors. 362. Bac. Abr. tit. "Man." (D.)

(c) R. v. Dr. Hay, 1 W. Blac. 640. S. C. Burr. 2295. Anon. Stra. 552. R. v. Bettesworth, Stra. 891, 956, 1111, 1118. Stewart v. Eddy, 7 Mod. 143. Anon., Andr. 24. Smith's case, Stra. 892. See generally as to *Lis pendens*, ante, p. 23, and post, tits. "Churchwarden," (Return *Lis pendens*), "Will," (Return *Lis pendens*.)

(d) Lovegrove v. Bethell, 1 W. Blac. 668. Com. Dig. tit. "Man." (A.) And see R. v. Dr. Harris, 1 W. Blac. 430. Anon., Holt, 656; 5 Mod. 374; 1 Salk. 250, 251.

(e) R. v. Bettesworth, T., 12 Geo. 2, Stra. 1111. Com. Dig. tit. "Man." (D. 3.)

(f) Blackborough v. Davis, 1 P. Wms. 43, per Holt, C. J. Sand's case, 1 Sid. 179.

(g) R. v. Raines, 12 Mod. 136. S. C. 12 Mod. 205. S. C. Salk. 299. S. C. Carth. 457. S. C. 3 Salk. 162. S. C. 3 Salk. 233. S. C. Holt. 310. S. C. Ld. Raym. 361. S. C. 3 P. Wms. 337, n. (b.) Fitzg. 125. Steward v. Eddy, 7 Mod. 143. Gray v. Tench, Comb. 454. Anon., 7 Mod. 140; Ld. Raym. 262. Blackborough v. Davis, 1

will *supersede the writ; or if it appear on the affidavits in support [*36] of the application for the writ, will deny it.(h)

—]. *Administration Bond; Production, &c.*—Where the production of the original administration bond, given to the Archbishop of Canterbury, on the grant of administration, is material, in a suit brought by the creditors of the intestate, in the name of the archbishop; and the record keeper of the Prerogative Court refuses to allow the bond to be taken out of his office, as being contrary to the practice of the Prerogative Court, the proper course is to proceed by a mandamus to the Ecclesiastical Court, upon the discussion of which, the validity of the objection to produce the bond, may be gone into;(i) such a mandamus issues ex debito justitiæ.(j)

—]. *Distribution.*—The writ of mandamus is also grantable to command a distribution to those entitled(k) of an intestate's personal estate, according to the stat. 22 & 23 Car. 2, c. 10,(l) and, as by such statute, there can be no representation after brother's and sister's children, so a mandamus for letters, &c., to the issues of such children, will be refused.(l)

ADMIRALTY, COURT OF]. See tit. *Courts Inferior*.

ADMIRALTY, LORDS OF]. See tits. *Contract; Halfpay; Pension; Treasury (Lords of)*.

ADVOCATE OF DOCTORS' COMMONS.] It has been settled that a mandamus does not lie to command the Archbishop of Canterbury, to issue his fiat to the Vicar General of his province, to make out a receipt under his seal, commanding the Dean of the Arches to admit a Doctor of Civil Law, graduated at Cambridge, to be an advocate of the Court of Arches, for the Court of B. R. has no authority to administer a legal remedy, except to enforce a legal right,(m) and it would seem, in analogy with the

P. Wms. 47. *Pierce v. Perks*, 1 Sid. 281. *Offley v. Best*, 372. S. C. 1 Lev. 187. R. v. Dr. Hay, 1 W. Blac. 640. *Lovegrove v. Bethel*, 1 W. Blac. 668. Wms. Exors. 336. But see contra, *Walker v. Woolaston*, 2 P. Wms. 576, 589. S. C. Stra. 917. S. C. Fitz. 202. S. C. 1 Barn. 423, 467. *Willis v. Rich*, 2 Atk. 285. *Impey v. Pitt*, 2 Show. 69, not. See ante, p. 23.

(h) *Anon.*, 5 Mod. 374. *Frederick v. Hook*, Carth. 153. R. v. Hay, Burr. 2295. Com. Dig. tit. "Man." (B.)

(i) *Canterbury (Archbp.) v. Tubb*, 3 Bing. N. C. 787.† S. C. 4 Scott, 543.

(j) *Canterbury, (Archbp.) v. House*, Cowp. 140. Bac. Abr. tit. "Man." (D.)

(k) *Pett's case*, 1 P. Wms. 25. S. C. 1 Salk. 250-1. *Blackborough v. Davis*, 1 Salk. 251. S. C. Holt, 43.

(l) See supra, tit. "Act of Parliament." *Pett v. Pett*, 1 Com. 87. S. C. Ld. Raym. 571. S. C. 12 Holt, 259. S. C. 1 Salk. 250. S. C. 3 Salk. 138. S. C. 2 Eq. Abr. 435, pl. 16. S. C. 12 Mod. 409. S. C. 1 P. Wms. 25. *Bowers v. Littlewood*, 1 P. Wms. 594. *Gibs. Cod.* 481; 4 Burn's Eccl. Law, 370; 2 Vern. 233; *Prece. Chan.* 28. *Caldicot v. Smith*, 2 Show. 286; *Lovell*, 77. *Carter v. Crawley*, Raym. 496.

(m) R. v. *Canterbury (Archbp.)*, 8 East, 213. See also R. v. *Lincoln's Inn*, 7 D. & R. 364, per Abbott, C. J.; and 7 D. & R. 364, n. (a). Bac. Abr. tit. "Man." (C.) See tit. "Inn of Court."

rule as to Inns of Court, that no one has an inchoate right to be admitted a member of the College of Doctors of Law; and, therefore, that a mandamus will not in any case lie to command such an admittance.

*AFFILIATION.] See tit. *Bastardy*.

[*37]

ALDERMAN.] Although the office of alderman be not a place of profit, but of freedom and government merely,⁽ⁿ⁾ yet the remedy by mandamus has been, by several statutes, made applicable to the office of alderman.^(o)

This subject is arranged as follows:—

Alderman - - - - -	37	Alderman.			
Election - - - - -	37	Enforcing duty - - - -	38		
Application - - - - -	37	Removal - - - - -	38		
Rule - - - - -	37	Restoration - - - - -	38		
Service - - - - -	38	Returns - - - - -	39		
Return and admit - - - -	38	General - - - - -	39		
Admit - - - - -	38	Non-residence - - - -	40		
Swear - - - - -	38	Erasure of Corporation			
Present and swear - - - -	38	Books, &c. - - - - -	40		
Admit and swear - - - -	38	As to summons - - - -	40		

—.] *Election*.—It seems to be now settled, that a mandamus will not be granted to command a corporation to fill up the office of alderman where the number is indefinite.^(p) But where the number of the aldermen is definite, and there is a vacancy, then it lies to command the proceeding to an election of, and to elect an alderman.^(q) But the Court will not, nor has it the power, on the motion of the defendant, to give any directions respecting, or to prescribe the time of election, for that must be governed by the constitution of the city.^(r) The Court will, however, in order to ensure such election, grant the writ to command the aldermen, &c., to attend a corporate meeting for the purpose of such election.^(s)

The Court of B. R. has, by such writ, commanded the Court of Aldermen of London, to return certain persons to the Court of Aldermen, as the persons chosen by the wardmote, &c., and also, if upon a false return, of persons not chosen by the wardmote, they refuse to do justice to the parties injured, after complaint made.^(t)

— *Application, Rule*.—The application for the rule may be made

(n) *Exeter (City), v. Glide*, 4 Mod. 33.

(o) See stat. 11 Geo. 1, c. 4; 5 & 6 Wm. 4, c. 76; and 1 Vict. c. 78, s. 26, App. See tits. "Office," "Act of Parliament."

(p) *R. v. Fowey (Mayor)*, 2 B. & C. 588, 590,† per Abbott, C. J. But see p. 596, Best, J., contra. S. C. 4 D. & R. 139.† And see *R. v. Pateman*, 2 T. R. 777.

(q) See stat. 6 & 7 Vict. c. 89, App. *R. v. Evesham (Mayor)*, 7 Mod. 166. S. C. Stra. 949. S. C. 2 Barn. 236, 265. *R. v. Bridgewater (Mayor)*, 2 Chit. 256.† *R. v. Fowey (Mayor)*, 4 D. & R. 139.† S. C. 2 B. & C. 588.† *R. v. Attwood*, 4 B. & Ad. 482.† *R. v. Salway*, 9 B. & C. 432.† See tit. "Office," (Election).

(r) 7 Mod. 166. S. C. Stra. 949. S. C. 2 Barn. 236, 265, supra. But see stats. App.

(s) *R. v. Kirke, &c.*, 5 B. & Ad. 1089.†

(t) *R. v. Heathcote*, 10 Mod. 59. S. C. Fort. 253, 283; Salk. 670.

immediately upon the default of the Municipal Corporation, &c., in [*38] *going to the election;(*u*) but the Court will not, as before stated, name a day for the election in the rule, but will leave that to the proper officer, and if he do wrong, the parties may then go to the Court to oblige him to act rightly.(*v*)

— *Service*.—The rule should be served on all parties, who are bound to attend and assist at such election.(*w*)

—.] *Return and Admit*.—The writ has also been granted to command a return to the Court of Aldermen, of one chosen alderman, and also to the Court of Aldermen to admit him.(*x*)

—.] *Admission*.—It lies also to command admission to such office.(*y*)

—.] *Swear*.—It lies also to command the swearing in of an alderman.(*z*)

—.] *Present and swear*.—So the writ has been granted to command the bailiff and jurats of a borough to present and admit to the office of alderman.(*a*)

—.] *Admit and Swear*.—So it has been granted to admit and swear into such office.(*b*)

—.] *Enforcing Duty*.—The writ has been granted to enforce the duty of the office of alderman.(*c*)

—.] *Removal*.—It lies in some cases to command a municipal corporation to assemble and consider the propriety of removing from their offices certain aldermen. For the cause of the writ in such case is connected with the administration of justice.(*d*)

—.] *Restoration*.—It lies to restore to the office of alderman one improperly removed therefrom.(*e*) But it does not lie to restore A.,

(*u*) R. v. Cambridge (Mayor, &c.), 4 Q. B. 801.† See stat. 6 & 7 Vict. c. 89, App., as to notice and practice.

(*v*) R. v. Bridgewater (Mayor), 2 Chit. 256.† R. v. Evesham (Mayor), 7 Mod. 166. S. C. Stra. 949. S. C. Barn. 236, 265. See tit. "Burgess."

(*w*) R. v. Fowey (Mayor, &c.), 4 D. & R. 139.† per Abbott, C. J.

(*x*) R. v. Montacute, 1 W. Blac. 61. S. C. 1 Wils. 283, citing R. v. London (Mayor), Bac. Abr. tit. "Man." (C.)

(*y*) R. v. Norwich (Mayor), 2 Salk. 436. S. C. Holt. 444, where see returns to such a writ.

(*z*) Anon. 2 Show. 183.

(*a*) R. v. Ld. Moutacute, 1 W. Blac. 61. S. C. 1 Wils. 283, citing R. v. Clithero (Mayor.)

(*b*) R. v. London (Mayor), 9 B. & C. 1.† S. C. 4 M. & R. 46. R. v. London (Mayor), 3 B. & Ad. 255, 266.† S. C. 2 N. & M. 126.† Trem. Pl. Cor. 465, where see a form of writ. See tit. "Town Clerk."

(*c*) R. v. Portsmouth (Mayor), 3 B. & C. 155.† See tits. "Mayor," "Corporation" (Municipal), "Office."

(*d*) R. v. Portsmouth (Mayor, &c.), 3 B. & C. 153.† S. C. 4 D. & R. 767.† R. v. Truro, H. T. 1821. R. v. Monday, Cowp. 530. R. v. Heaven, 2 T. R. 772; Bull. N. P. 199. See also 5 D. & R. 414.†; 5 D. & R. 481.† R. v. Totness (Mayor), 5 D. & R. 481.† See R. v. West Looe (Mayor), 5 D. & R. 414.† See tits. "Capital Burgess" (Removal), "Councilman" (Removal), "Office" (Removal).

(*e*) Shuttleworth v. Lincoln (Corporation), 2 Bulst. 122, also cited in Stamp's case, Raym. 12. R. v. Gloucester (Mayor), 3 Bulst. 189. S. C. 1 Roll. 409. Haddock's case, Raym. 435. R. v. The Bailly, &c., 1 Keb. 33. Wigan (Town), v. Pilk-

elected alderman, &c., in the place of B., afterwards restored by mandamus, though the place of B. be afterwards vacant, for A. must be elected de novo.(f) [*39]

So it lies to restore an alderman to his precedence in a corporation.(g) But it lies not to restore a poor alderman,(h) poverty having been held to be a good ground for deprivation from magistracy.

— *Returns.*—Formerly, it was a good return to a mandamus to restore to the office of alderman, that the prosecutor had not taken the statutory oaths.(i) So, formerly, it was a sufficient return, that the prosecutor was turned out by the commissioners acting by virtue of the Act of Corporations.(j)

But inasmuch as an alderman may be properly removed from his office for any matter contrary to the duty of such office, so such matter will be good as a return.(k) As an alderman cannot be removed at pleasure, so the return of a custom to do so will be bad.(l) But it has been held not to be a good return, that the prosecutor lends money to young men by the hands of his wife, for such is merely a collateral cause, and not trenching to things incident to the place of alderman.(m) Nor can he be removed for publicly or *privately speaking scandalous words of the mayor,(n) if not spoken of him as mayor. [*40]

ington, 1 Keb. 597. *Cripps v. Mainstone* (Mayor), 1 Keb. 812, citing *Warren's case*, Cro. Jac. 540, and *Estwick's case*, Sty. 43. *R. v. Rippon* (Town), 2 Keb. 15. — *v. Wiggon* (Mayor), 1 Sid. 92. *R. v. Barker*, Burr. 1268, per Ld. Mansfield. *R. v. Shrewsbury* (Mayor), 2 Barn. 394. S. C. Stra. 1051. S. C. W. Keb. 282. S. C. 7 Mod. 201. S. C. Andr. 85, 104, 171, 320. *R. v. Oxford* (Mayor), Palm. 451. S. C. Noy. 92. S. C. Latch. 229; 2 Dyer, 332 b., 333, pl. 28. *Lumley's case*, E., 3 Car. B. R., there cited. *Coventry's case*, Latch. 123. S. C. Poph. 176. *Taylor's case*, Poph. 133. *R. v. Doncaster* (Mayor), Say. 37. Anon. Sty. 151. *R. v. Rippon* (Mayor), 2 Salk. 433. *R. v. Andover* (Mayor), 3 Salk. 229. *R. v. Taylor*, 3 Salk. 231—8. *R. v. Raines*, 3 Salk. 233, 11, s. 16. Com. Dig. tit. "Man." (A.) *R. v. London* (City), Skin. 293, 301. S. C. 4 Doug. 360. *Smith's case*, Carth. 217. S. C. 4 Mod. 52, 53. S. C. 1 Show. 263, 274, 280. S. C. 12 Mod. 17. S. C. Holt, 168, 310; Trem. 511. *R. v. Stafford* (Mayor), 2 Keb. 264; March, 288, pl. 237. *R. v. Brayfield*, 2 Keb. 488. *R. v. Jay*, 3 Keb. 714. *R. v. Leicester* (Mayor), Burr. 2087, 2089; *Braithwaites*, 1 Vent. 19. *R. v. Sanchar*, 2 Show. 66, 67. S. C. 2 Jones, 121; Trem. Pl. Cor. 511, 512, 517, 523, 544, where see forms of writ. *Exeter* (City), v. Glide, 4 Mod. 33. S. C. 1 Show. 258, 364. S. C. 1 Comb. 197. S. C. Holt, 169, 435. S. C. 12 Mod. 28, 251. S. C. Ld. Raym. 223. *Bagg's case*, 11 Rep. 99. *Enfield v. Hills*, Sir T. Jon. 116. *R. v. Thacker*, Sir T. Jon. 121.

(f) *Shuttleworth v. Lincoln* (Corp.), 2 Bulst. 122. Com. Dig. tit. "Man." (B.)

(g) See *R. v. Barker*, Burr. 1269, 1270. *R. v. Dublin* (Dean), Stra. 542. *R. v. Canterbury* (City), 1 Lev. 119, also cited in Dr. Walker's case, Cas. t. Hard. 214. See tit. "Precedence."

(h) *R. v. Andover* (Mayor), 3 Salk. 229, 3. But see *R. v. Liverpool*, Burr. 723.

(i) *R. v. London* (Mayor), 12 Mod. 17. *R. v. Exeter*, Comb. 197. For the form of a return to a writ to restore, &c., see *R. v. London* (Mayor), 4 Doug. 360.† *R. v. Thacker*, Sir T. Jones, 121. See tit. "Office," (Return Oaths).

(j) *R. v. Cooper*, 1 Keb. 777, and Prin's case, there cited.

(k) *R. v. Philingham*, 1 Keb. 777. *R. v. Exeter* (Mayor), Comb. 197. *Bagg's case*, 1 Roll. 173, 224. S. C. 11 Rep. 93, b. See tit. "Office," (Restoration Return).

(l) *Warren's case*, Cro. Jac. 540; 2 Dyer, 332, 6, n. 2; Roll. 112, cited in *R. v. Oxford* (Mayor), Latch. 231. See also *Cripps v. Maidstone* (Mayor), 1 Keb. 812. See tit. "Town Clerk" (Restoration Return).

(m) *R. v. Gloucester* (Mayor), 3 Bulstr. 189. *Bagg's case*, 11 Rep. 93.

(n) *R. v. Oxford* (Mayor), Latch. 229; Cro. Jac. 540, supra. *R. v. Exeter* (Mayor), Comb. 197. See tit. "Office" (Restoration Return).

But it is a good return, that the prosecutor is a common drunkard, for if he be ebrius common, and not by accident, he is an unfit person for government; and this, therefore, is a good cause to remove him.(o)

——. *Non-residence*.—If an alderman absent himself from the place for which he is appointed, it is good cause for removal, because residence is incident to his office. And in a return of such a cause, the words *deseruit* and *reliquit* have been held to mean an absolute leaving.(p) The nature of the office of alderman requires that the person holding must be both a citizen and an inhabitant of the place where chosen; his very name imports it; therefore, as non-residence makes him incapable of doing his duty, so a return that “*recessit elongavit et habitationem suam reliquit et deseruit, et amovebat seipsum et familiam suam ad A. extra civitatem, &c., et officium suum voluntarie reliquit et neglexit,*” (setting forth wherein), and that he had notice of several Courts held, but did not attend them, has been held to be good.(q) So where the return states that the prosecutor has totally left, &c., it is good, but contra if it merely state the absence to be for a limited and reasonable time.(r)

——. *Erasure, &c. of Corporation Books*.—So it is a good return that the prosecutor, contrary to his duty and oath of office, *spoliavit et dilaceravit quædam recorda, &c.* of a Court, and which offence was afterwards presented; notwithstanding the presentment be not shewn.(s)

——. *As to Summons*.—But before the judgment of amotion can be legally pronounced, the party must have been summoned for his apparent misconduct, and such summoning must be shewn upon the face of the return, as an excuse or justification might have been proved.(t) If, however, it appear that the prosecutor was not an inhabitant within the city at the time of the amotion, &c., there is no need of an averment of summons, for the difference is, where there is an opportunity of summoning him and where not.(u)

ALEHOUSE.] *License*.—It does not lie to command justices to license a [*41] victualler to sell ale, notwithstanding it was suggested their refusal proceeded from a mistaken view of their jurisdiction,(v) and also,

(o) *R. v. Gloucester (Mayor)*, 3 Bulstr. 189. S. C. 1 Roll. 409; 2 Roll. Abr. 455. See tit. “Office” (Restoration Return).

(p) *Exeter (City)*, v. Glide, Holt, 169, 435. S. C. 4 Mod. 33; 3 Bulst. 189; 1 Co. 409. See tit. “Office” (Restoration Return).

(q) 4 Mod. 33, *supra*.

(r) *R. v. Leicester (Mayor)*, Burr. 2087. *R. v. Exeter*, Comb. 197. Com. Dig. tit. “Man.” (D. 4).

(s) *Wigan (Town)*, v. Pilkington, 1 Keb. 597. See tit. “Office” (Restoration Return).

(t) Comb. 197, per Holt, C. J., citing Mod. 135, 833. *R. v. Shrewsbury (Mayor)*, 7 Mod. 201. S. C. 2 Barn. 394. *R. v. Heaven*, 2 T. R. 772. *R. v. Chalk, Ld.* Raym. 225. S. C. Salk. 428. S. C. 5 Mod. 254, 257. *R. v. Brayfield*, 2 Keb. 488. *R. v. Lyme Regis*, Doug. 149, 160; 12 Mod. 29. *Exeter (City)*, v. Glide, 4 Mod. 33, and post, “Application,” and tit. “Office” (Restoration Summons).

(u) 12 Mod. 29, *supra*. See post, tit. “Office” (Restoration Return).

(v) *R. v. Farrington (J.)*, 4 D. & R. 735.† Anon. 1 Barn. 402.

notwithstanding a very strong case of partiality, &c. was made out; for it is a matter entirely within their discretion.(*v*) The proper course in such a case, is to move for a criminal information.(*c*)

Nor does it lie to command justice to rehear an application for an ale-house license which they have refused, though it be suggested that their refusal proceeded from a mistaken notion as to their jurisdiction;(y) nor to rehear an application at any other period of the year than within the first twenty days of September, though the justices may have refused the license under a misapprehension of the law.(z)

It lies, however, to command justices to receive the information and complaint of one who prosecutes as well for himself as for the poor, &c., against another for selling ale and beer by retail without being duly licensed, and to proceed to hear and adjudge thereon.(a) So it lies to command justices to enter continuances upon an appeal against a conviction by two justices, under the Alehouse Act, 9 Geo. 4, c. 61.(b)

ALE-TASTER.] *Swearing in*.—It lies to swear in an ale-taster, as the ale-taster of Honiton; the having such office appearing to be a condition precedent to his being chosen portreve, who is the returning officer for Members of Parliament.(c)

ALIMONY.] A writ of mandamus has been granted, commanding a husband to grant his wife alimony, but it is presumed, that at this day a writ for such purpose would not be awarded.(d)

ALLEGIANCE OATH.] See tit. *Manor (Leet Resiant)*.

ALMS.] See tit. *Charity*.

AMICABLE ASSURANCE COMPANY.] *Director, Swearing in*.—It lies to command the swearing in of a director of a chartered company, as the Amicable Assurance Company.(e)

*ANSWER IN CHANCERY.] See tit. *College (Seal)*. [**42*]

APPARITOR GENERAL.] It lies for the office of apparitor general of

(w) Anon. 1 Barn. 402. Giles's case, Stra. 881. S. C., and cited in R. v. Canterbury (Archbp.), 15 East, 127. Com. Dig. tit. "Man." (B.), Andr. 180. See ante, pp. 12, 13, 14.

(x) R. v. Nottingham (J.), Say. 217. R. v. Young, &c., Burr. 561. And see Burr. 1317; Burr. 1318; 1 T. R. 692; and Salk. 45, tit. "Alehouses."

(y) R. v. Farringdon Ward (J.), 4 D. & R. 735.†

(z) R. v. Surrey (J.), 5 D. & R. 308;† and see 4 D. & R. 735.† But see tit. "Quarter Sessions."

(a) R. v. Drake, 6 M. & S. 116. See tit. "Quarter Sessions."

(b) R. v. Cheshire (J.), 3 P. & D. 33, n. (a).

(c) Ravenhill's case, Stra. 608. Com. Dig. tit. "Man." (A.) See tit. "Portreve."

(d) R. v. Patrick, 2 Keb. 167, per Windham, J. See ante, p. 29.

(e) Anon. Str. 696. Com. Dig. tit. "Man." (A.) See tit. "Company."

the Archbishop of Canterbury,(f) he being the messenger who serves the process of the Spiritual Court. His duty is to cite offenders to appear, to arrest them, and to execute the sentence or decree of the Judges, &c.(g)

But it will not lie to command him to execute his duty,(h) for he is a servant of his Court, and punishable there.

APPEAL.] See tit. *Quarter Sessions (Appeal)*.

APPRENTICE.] As to admitting apprentices to freedom, &c., see titles *Franchise*; *Freedom*.

The writ has been granted to command the Surgeons' Company of London to receive an apprentice, if duly qualified.(i) As to pauper apprentices, see tit. *Poor*.

APPROVED MEN OF GUILDFORD.] See tits. *Ashburton, &c.*; *Guildford, &c.*

APPROVER OF GUNS.] See tits. *Gunmakers' Company*; *Office*.

ARBITRATOR.] *Umpire, Appointment*.—It lies to command an arbitrator, under an act of Parliament, to appoint an umpire.(j)

ARCHDEACON.] *Admission*.—It lies to admit to the office of archdeacon,(k) and as a dean and chapter who have power to make bye-laws, cannot by virtue of that power make a bye-law, that an archdeacon shall take the oath of canonical obedience, and to keep the secrets of the chapter, before he is admitted into his office, so the refusal to take such an oath at such time is not a good return to such a mandamus.(l)

But a return to such a writ of non fuit electus, is good.(m)

—.] *Restoration*.—It lies also to restore to the office of archdeacon.(n)

—.] *Liability of*.—An archdeacon being within the general rule on this subject, is not liable to an action for swearing in, &c. a wrong person *under the authority of a mandamus.(o) As to the office of archdeacon's register, see tit. *Registrar*.

(f) Foulke's case, cited in *R. v. Dr. Ward*, 1 Barn. 295, in *S. C. Stra.* 897; and in *R. v. Canterbury (Archbishop)*, 8 East, 218.

(g) See stat. 21 Hen. 8, c. 5.

(h) See tit. "Office." Bac. Abr. tit. "Man." (D.) And see tit. "Office" (Officers, Ministerial, Inferior).

(i) *R. v. Surgeons' Company*, Burr. 892, where see form of writ and return.

(j) *R. v. Goodrich*, 2 Smith, 388. See tit. "Act of Parliament." See tit. "Award."

(k) *R. v. Trinity Chapel (Dean)*, 8 Mod. 27, and see *Gastrell v. Jones*, 2 Roll. 449; 6 Com. Dig. tit. "Serement" (B.) *R. v. Patrick*, 2 Keb. 171, per Keeling, C. J., Register, 307, 331. See tit. "Office." (l) Id.

(m) Hereford's case, 1 Sid. 209, 210. S. C. 1 Keb. 635, 660, 716.

(n) *R. v. Lambert*, 12 Mod. 3. S. C. Carth. 170, nom. Lambert's case, where it is stated to be the office of "Register," &c.

(o) *R. v. London, (Mayor)* 10 Mod. 53, 54, citing 1 Roll. 108, and see stat. 6 & 7 Vict. c. 67, s. 3, App.

ARMOURERS AND BRAZIERS.] See tits. *Company; Freedom (Company.)*

ARTICLES OF PEACE.] See tit. *Peace, Articles of.*

ASHBURTON, EIGHT MEN OF.] *Restoration.*—A mandamus has been granted to restore to the office of one of the “eight men of Ashburton;”(p) it having been cited that a mandamus had been granted to swear one of the “twenty-four men of Tiverton,” they having no other name. And the Court, in granting the application in the principal case, ordered the mandamus specially to recite therein so much of the office as would make it appear to be the proper subject of a writ of mandamus.(q)

In another case,(r) a mandamus is stated to have been applied for to “swear in one who was elected to be one of the eight men of Ashburn Court;” which was (according to that report) denied for its uncertainty, for it ought specially to have expressed what the office was, and what was the place of the “eight men,” that it might appear to the Court to be such a place for which a mandamus lay, and the Court further remarked, that though such a writ had been granted for one “of the approved men of Guildford,” yet it was specially set forth what his office was.(s)

ASSESSORS.] See tit. *Burycss Roll.*

ATTORNEY.] A mandamus will be granted in respect of the office of an attorney of an inferior Court, it being one of public concern, because it regards the administration of justice, and also because there is no other remedy.(t)

This title is arranged as follows :—

ATTORNEY.					ATTORNEY.				
To practice	-	-	-	43	Restoration	-	-	-	44
Admission	-	-	-	44	Delivery up of Rolls, &c.	-	-	-	45

—.] *To Practice.*—It will be granted to allow one duly entitled, to practice in an inferior Court,(u) as the inferior Court of Reading;(v) *Havering Court, Essex; the Stepney Court, &c., and the Lord [*44] Mayor of London’s Court;(w) but the Court of B. R. will not lend its assistance to an attorney of a superior Court to allow him to practise

(p) R. v. Exeter, (Dean) 2 Show. 217. S. C. 2 Mod. 316; 3 Bac. Abr. 530. Trem. pl. Cor. 467, 468, where see form of writ.

(q) See R. v. Guildford, (Approved Men of,) 1 Lev. 162. S. C. Raym. 152.

(r) 2 Mod. 316. R. v. Exeter. (Dean.)

(s) See tits. “Guildford,” (Approved men), “Tiverton,” (twenty-four-men of.)

(t) Lee’s case, Carth. 169, 170. White’s case, 6 Mod. 18 per Holt., C. J. Leigh’s case, 3 Mod. 335. See tits. “Courts, Inferior.”

(u) R. v. Barker, Burr. 1268. See R. v. Raines, 3 Salk. 233, 13. R. v. London, (Mayor), 16 L. J., N. S. 185; Q. B., where see form of writ.

(v) 1 Vent. 11; 1 Sid. 410. 1 Mod. 23; Bac. Abr. tit. “Man.” C.

(w) 16 L. J., N. S. 185, Q. B. A writ of error is, however, pending against this decision.

in such inferior Court as he may do so of right, unless the number be limited to the exclusion of others by act of Parliament, charter, prescription, &c., and then he will require an appointment.(x)

—.] *Admission*.—It lies also to admit an attorney of the Court of the Sheriffs of York.(y) So of the Marshal's or other Court.(z) But if the Court of B. R. has no jurisdiction or power to enforce admittance, &c., the writ will be refused. Thus a rule for a mandamus to the principal and ancients of Barnard's Inn to admit an attorney into the Society was discharged, as it was not shown that the Court had the requisite authority over the Inn.(a) But it seems a mandamus should not issue to the Judges of an inferior Court, commanding them, in the first instance, to admit an attorney of B. R. to practise there, but that the mandamus, if any lies, must be to examine whether he is capable and qualified to be admitted according to the stats. 2 Geo. 2, c. 23, and 6 Geo. 2, c. 27.(b)

—.] *Restoration*.—So it will be granted to restore an attorney to his place in an inferior Court.(c) Thus it lies to restore an attorney of the Sheriff's Court of York.(d) So to restore an attorney within the liberty of St. Martyn le Grand.(e) So to restore an attorney of the Borough Court of Southwark,(f) or of the Court of the Corporation of Colchester.(g) So it was granted after many arguments and much deliberation, to restore an attorney of the town Court of Canterbury, it not being such an office with which the commissioners for corporations had power to intermeddle.(h) *So it has been granted to restore an [*45] attorney improperly suspended from practising in the Courts of the County Palatine of Chester. But a return of suspension for speaking

(x) *Gilman v. Wright*, 1 Sid. 410. S. C. 1 Vent. 11 S. C. 2 Keb. 477, 584. *Hurst's case*, Raym. 56, 94. S. C. 1 Sid. 94. S. C. 1 Lev. 75, citing *Underwood's case*. *Hasting's case*, 1 Sid. 410. S. C. 1 Mod. 23. *Anon.*, March, 141. R. v. York, (Sheriffs,) 3 B. & Ad. 775;† But see 16 L. J., N. S. 186, Q. B.

(y) *R. v. York (Sheriffs)*, 3 B. & Ad. 770.†

(z) See 1 Sid. 93, 152. Ray. 56, 94; 1 Lev. 75, *supra*. Com. Dig. tit. "Man." (A.)

(a) See ante, pp. 10, 11. *R. v. Barnards Inn*, 5 A. & E. 17.†

(b) *R. v. York (Sheriffs)*, 3 B. & Ad. 770, 781.† And see 1 Mod. 23. S. C. 1 Sid. 410. S. C. 1 Vent. 11 *Supra*.

(c) *Leigh's case*, 3 Mod. 333, citing *Hurst v. Canterbury*, (Mayor), 1 Sid. 94. S. C. 152. S. C. 1 Lev. 75. S. C. Raym. 56, 94. See *R. v. Rushworth Kely*, 288. *R. v. Raines*, 3 Salk. 232, 13. *Anon.*, March, 141. *R. v. Oxenden*, 1 Show. 219; Keb. 549. Bac. Abr. tit. "Man." C.

(d) *R. v. York (Sheriffs)*, 2 Show. 154.

(e) *Collin's case*, 1 Keb. 549, also cited in *Hurst's case*, 1 Sid. 152; and see 1 Lev. 75. See also, *R. v. Canterbury*, (Archbishop), 8 East, 216. The writ should be directed to the steward. Bac. Abr. tit. "Man."

(f) *Underhill's case* cited in *Hurst's case*, 1 Keb. 287, and in S. C. 1 Lev. 75. S. C. 1 Sid. 152.

(g) *R. v. Colchester (Town)*, 2 Keb. 188.

(h) *Hurst's case*, Raym. 94, 56, (the applicant having been improperly removed by the Commissioners for Corporations acting under the Statute of Corporations.) S. C. 1 Lev. 75. S. C. 1 Sid. 94 (citing *Underwood's case*) S. C. 1 Keb. 349, 354, 387, (Twysden saying, that as the writ was grounded on *Magna Charta*, that none should be disseised of liberties or franchises, that therefore, the mandamus should be granted, 558, 675, cited also in *R. v. Canterbury*, (Archbishop), 8 East, 216. Bac. Abr. tit. "Man." C.)

contemptuous words of the presiding Judge is good.(i) So it has been granted to restore one of the attorneys of the Marshalsea Court.(j)

—.] *Rolls delivery, &c.*—The Court will not grant a mandamus to a manor steward being an attorney to deliver up Court rolls, &c., there being another remedy.(k)

AUDITOR OF CHAMBERLAIN'S AND BRIDGEMASTER'S ACCOUNTS.]

Admission.—It lies to command an admission to the office of auditor of chamberlain's and bridgemaster's accounts, if duly elected.(l)

AUDITOR OF CHURCHWARDEN'S ACCOUNTS. See tit. *Churchwarden*.

AUDITOR OF OVERSEER'S ACCOUNTS.] See titles *Churchwarden*; *Overseers*.

AUDITOR OF PARISH ACCOUNTS.] See titles *Churchwarden*; *Overseer (accounts)*; *Parish (auditor)*.

AUGMENTED CURACY. See tit. *Curacy (augmented)*.

AUTREFOIS ACQUIT.] See tit. *Courts Inferior (Records)*.

AWARD]. *Enforcing.*—It lies to enforce the payment by a company, of money which an arbitrator has awarded to be paid by its treasurer. But it was so held expressly on the ground that the action on the award could only be against the treasurer, and that his body and goods were exempted from execution by the statute incorporating the company.(m)

BAILIFF.] The writ lies for the office of bailiff of a borough.(n)

—], *election.*—It lies on stat. 11 Geo. 1, c. 4, s. 2, to go to the *election of bailiffs, and to command the holding of a Court for [*46] that purpose.(o)

—, *application, &c.*—See stat. 6 & 7 Viet. c. 89,(p) as to the necessary steps to be taken, before making the application, in order to obtain costs.

(i) Parker's case, 1 Vent. 331, and see "Mandamus," 2 Lent. 1014, for form of such return which in 1 Vent. 331, supra, was held to be good. Trem. Pl. Cor. 516, where see form of writ.

(j) Underwood's case, Ann., 1651, cited in Hurst's case, 1 Sid. 94.

(k) R. v. Earle, Burr. 1197. But see tits. "Corporation, Municipal" (Insignia.) "Manor" (Rolls.)

(l) R. v. London (Mayor), 1 T. R. 423.

(m) R. v. St. Katherine's Dock, 4 B. & Ad. 360.† S. C. 1 N. & M. 121,† also cited in R. v. Nottingham Water Works, 6 A. & E. 365. See tits. "Inclosure," "Arbitration," "Money," "Company" (Execution.)

(n) R. 3 Rol. 456, l. 20, 32. Com. Dig. tit. "Man." (A.) Scarborough's case, Stra. 1180; and see also Stra. 1003, 1157; see stats. 9 Ann. c. 20; 11 Geo. 1, c. 4, and 1 Vict. c. 78, s. 26, App. See tit. "Office."

(o) See stat. App. R. v. Woodrow, 2 T. R. 732. Scarborough's case, Stra. 1180. R. v. Malden, (Bailiffs), 2 Salk. 431. S. C. Ld. Raym. 481.

(p) Appendix.

—,] *admit and swear*.—It lies to admit and swear into the office of bailiffs of a corporation(*q*) or of a town.(*r*)

—,] *restoration*.—It also lies to restore to the office of bailiff if improperly disfranchised.(*s*)

BAILIFF OF MANOR.] See tit. *Manor (Bailiff)*.

BANK OF ENGLAND.] *Transfer of stock*.—The Court will not grant a mandamus to command the Bank of England to transfer stock, because there is a remedy by an action on the case if they refuse, which action would afford a satisfaction equivalent to a specific relief.(*t*)

—,] *accounts*.—Nor will the Court command the Bank of England, at the instance of one of its members, to produce an account of the income and profits of a certain period, with an account of the charges of management, for the purpose of enabling the next general Court to consider the state and condition of the company, and to declare a dividend, in the absence of any parliamentary direction that such accounts should be produced. For such an application is in effect made by one on behalf of several partners to compel his co-partners to produce their accounts of profit and loss, and to divide those profits, if any there be; a subject over which the Court of Chancery has alone jurisdiction.(*u*)

BANKRUPT.] *Further examination*.—It lies to command commissioners of bankrupt to issue their warrant for a further examination of a bankrupt, on a suggestion that he is desirous of fully disclosing his estate and effects, although the bankrupt had been previously, after repeated examinations, finally committed by the commissioners for not having satisfactorily answered.(*v*) But it has also been decided, that where a party has been committed for not having answered satisfactorily before the com-
[*47] missioners he may have a habeas corpus to bring him before the commissioners for further *examination, but cannot, by a mandamus, throw the expense of bringing him up on the state.(*w*)

—,] *Certificate*.—It does not lie to command the commissioners of bankrupt to sign a certificate of a bankrupt's conformity, because a discretion is vested in the commissioners, of which the Court cannot enforce the exercise in any particular way.(*x*)

(*q*) *R. v. Ipswich (Bailiffs)*, 1 Barnard. 407. *Vanhan v. Lewis*, Carth. 227. See tit. "Corporation," (Municipal.)

(*r*) *R. v. Clithroe (Town)*, 6 Mod. 133.

(*s*) *Tompson v. Edmonds*, 2 Rol. Ab. 456, pl. 4, T., 4 Jac. B. R.

(*t*) *R. v. Bank of England*, 1 Doug. 524. See also *R. v. Nottingham Water Works*, 6 A. & E. 364.† *Bac. Abr. tit. "Man."* C. 2. See *Ante*, p. 20.

(*u*) *R. v. England (Bank)*, 2 B. & A. 622. See *R. v. Wilts. Canal*, 3 A. & E. 482.† See *ante*, p. 22. See tit. "Company" (Duties, &c.).

(*v*) *In re Bromley*, 3 D. & R. 310.† And see *R. v. Surrey*, 6 Tr. R. 77. See tit. "Insolvent."

(*w*) *Ex parte Bagster*, 2 M. & R. 467.

(*x*) *In re King*, 7 East, 90, n. (*a*), and cited in 15 East, 126, and 9 East, 88. See *ante*, pp. 12, 13.

BARNARD'S INN, ATTORNEY OF.] See titles *Attorney*; *Inn of Chancery*.

BARON, COURT.] See tit. *Manor* (*Baron*.)

BARON AND FEME.] See titles *Administration*; *Alimony*.

BARRISTER-AT-LAW.] See tit. *Inn of Court*.

BASTARDS.] It lies to command justices of the peace to proceed generally in all matters as to bastard children, within their jurisdiction.(y) Thus it has been granted to command justices of the peace to take the examination of a pauper touching the reputed father of a bastard child of which she was pregnant, and also to issue their summons to such putative father, commanding his appearance before them, to answer for having disobeyed an order of bastardy made upon him under stat. 49 Geo. 3, c. 68, s. 3.(z) And also to command them to hear and determine an application for a bastardy order which they have improperly refused to proceed with,(a) but not to make an order of maintenance on a particular parish.(b)

So it lies to command them to receive and enter an application for an order of maintenance upon the putative father of a bastard under stats. 4 & 5 Wm. 4, c. 76, s. 72; 7 & 8 Vict. c. 101, and 8 Vict. c. 10.(c)

—.] *Appeal*.—It lies also to command justices at quarter sessions to cause continuances to be entered, and to hear an appeal against an order of affiliation of two magistrates, under stats. 49 Geo. 3, c. 68, s. 5, and 7 & 8 Vict. c. 101,(d) or any appeal against such an order which they ought to have heard;(e) but not if the sessions have no jurisdiction, or *have properly dismissed the appeal, on the ground of a defective [*48] notice of appeal or otherwise.(f)

An appeal does not lie to command the justices at sessions to enter continuances and hear an appeal against an order of affiliation duly made by

(y) R. v. Surrey (J.), 2 Show. 74. Bott's Poor Law, by Const, 46, 61, 207.

(z) R. v. Martyr, 13 East, 55.

(a) Ex parte Wallingford Union, 9 Dowl. 987. R. v. Walker, 14 L. J., N. S. 120, M. C. S. C. 3 D. & L. 131.

(b) R. v. Middx. (J.), 4 B. & A. 298. See R. v. Eye (Corp.), 4 B. & A. 271. R. v. Truro (Mayor), 3 B. & A. 590; 2 Chitt. 257.†

(c) R. v. Cambridgesh. (J.) R. v. Salop (J.) R. v. Gloucestersh. (J.), 1 P. & D. 249. S. C. 7 A. & E. 480.† S. C. 9 A. & E. 338.† R. v. Bridgman, 15 L. J., N. S. 44, M. C. R. v. Chesh. (J.), 15 L. J., N. S. 114, M. C. R. v. Hinchliffe, 16 L. J., N. S. 78, M. C.

(d) R. v. Salop (J.), 4 B. & A. 626. R. v. Flintsh. (J.), 15 L. J., N. S. 50, M. C. Ex parte Lowe, 15 L. J., N. S. 99, M. C. S. C. 3 D. & L. 737. R. v. Chesh. (J.), 15 L. J., N. S. 114, M. C. S. C. 4 D. & L. 94.

(e) Ex parte Becke, 3 B. & Ad. 704.† R. v. Lincolnsh. (J.), 3 B. & C. 548.† R. v. Oxfordsh. (J.), 1 B. & C. 279.† R. v. Gloucestersh. (J.), 2 D. & R. 426.† R. v. Oxfordsh. (J.), 5 D. 116. R. v. Lincolnsh. (J.), 5 D. & R. 347.†

(f) 2 D. & R. 426.† and cases supra. See tit. "Quarter Sessions." See ante, p. 29.

two justices at petty sessions, under stat. 2 & 3 Vict. c. 85, s. 1, as no appeal lies in such case.(g)

—.] *Costs*.—It however lies to command justices to make an order upon certain guardians of the poor to pay costs incurred in resisting an application made by such guardians under stats. 4 & 5 Wm. 4, c. 76, s. 73, and 2 & 3 Vict. c. 85, s. 1, for the maintenance of a bastard child, if the application has been fully heard.(h) For in all cases in which the Court of Quarter Sessions dismisses an application under stat. 4 & 5 Wm. 4, c. 76, s. 73, for an order of bastardy, on the ground that it is not made by the proper parties, it is bound to award to the person intended to be charged his costs of resisting the application, and, on refusal, a mandamus lies to command them so to do.(i)

—.] *Enforcing order of affiliation*.—So the Court will, by writ of mandamus, command a justice or justices to enforce an order of affiliation.(j)

But it lies not to command a justice to convict under stat. 5 Geo. 4, c. 83, a single woman for having run away and left her bastard child, as that statute applies to legitimate and not to illegitimate children.(k)

BEDFORD LEVEL.] *Receiver; Restoration*.—It lies to command the conservators of the Bedford Level to restore their receiver, if improperly removed, they being incorporated by stat. 15 Car. 2, and thereby required to appoint a collector and receiver.(l)

—.] *Registrar, admit and swear*.—The writ will be granted to command the Bedford Level Corporation to admit and swear into the office of registrar of such corporation, his duty being a public one, that is, to register titles and deeds relating to lands within the level; as to which he takes an oath of office. It has also been settled that an information in the nature of a quo warranto does not lie against him, he being a mere [*49] servant of the corporation, and his office not affecting any franchise or other authority held under the Crown.(m)

As to Drainage, see tit. *Drainage*.

BERMUDAS—COMPANY OF TRADERS TO.] *Restoration of Member*.—

(g) R. v. West. R. (J.), 4 P. & D. 668. S. C. 1 Q. B. 325.†

(h) R. v. Ld. Hastings, 1 D. & M. 132. S. C. 6 Q. B. 141.† S. C. 13 L. J., N. S. 111, M. C. R. v. Exeter (Recorder), 3 G. & D. 167. S. C. 5 Q. B. 342.† S. C. 13 L. J., N. S. 7, M. C. See tit. "Poor," (Costs).

(i) 3 G. & D. 167. S. C. 5 Q. B. 342,† supra. R. v. Monmouth. (J.), 12 L. J. R., N. S., M. C. 126; and see 7 & 8 Vict. 101, s. 1, 9.

(j) R. v. Codd, 1 P. & D. 456. S. C. 9 A. & E. 682.† R. v. Martyr, 13 East, 55.

(k) R. v. Maude, 2 D., N. S. 58. S. C. 11 L. J., N. S. 120, M. C. See tit. "Quarter Sessions," "Justice."

(l) Anon., 1 Barn. 195. In this case, however, the applicant was not turned out by the then directors, and upon that point (which is not clear,) the mandamus was granted. See tit. "Office" (Restoration.)

(m) R. v. Bedford Level, 6 East, 356, and cases there cited. Bac. Abr. tit. "Man." C.

It lies to command the restoration of one to be a member and assistant to the company of traders to the Bermudas.(n)

BIRTHS, REGISTRAR OF.] See tit. *Registrar of Births*.

BISHOP.] *Absolution*.—See such title.

—.] *Chrism*.—It has been granted to command a bishop to give oil to a priest with which to baptize.(o)

—.] *Confirmation*.—See such title.

—.] *Consecration*.—It does not lie to command the consecration of a bishop.(p)

—.] *Sacrament*.—See titles *Sacrament* ; *Prebendary*.

—.] *Visitation*.—See tit. *Visitation*.

—.] *Application* ; *Costs*.—If an application for a writ of mandamus for any cause be made against a bishop without good foundation, it will be discharged with costs.(q) But if the point raised be new and doubtful, the Court will not, in its discretion, inflict costs.(r)

BLACKSMITH'S COMPANY, CLERK OF.] *Delivery of Books, &c.*—It lies to command the delivery, by the late clerk of the Blacksmiths' Company, of all books, papers, &c., which he had obtained possession of by reason of being such clerk, and from which office he had been removed.(rr)

BLUE COAT SCHOOL.] *Restoration of Scholar*.—It lies not to restore a blue coat, he being but an almsman, and under the jurisdiction of a visitor.(s)

BOND.] See tit. *Compensation (Bond)*.

BOND—HIGH CONSTABLE'S.] See tit. *Constable*.

BOOKS, RECORDS, OFFICIAL PAPERS, &c.] *Delivery*.—The party entitled *to a public office has a right to the books and papers appertaining to such office, and the Court will command the delivery [*50] of them over by mandamus. But one who has a legal right to an office is not entitled to have books delivered by one who has an equitable right, and, therefore, a writ for that purpose would, in such a case, be refused.(t) So that where two persons are contending for an office, for

(n) Trott's case, 2 Keb. 693. See tit. "Company," "Corporation" (Municipal), "Franchise," "Freedom."

(o) See tit. "Chrism."

(p) Dr. Robert's case, 2 Keb. 102, per Windham, J.

(q) R. v. Chester (Ep.), 1 T. R. 396, 405. R. v. Oxford (Ep.), 7 East, 600, 606. See tit. "Costs."

(r) R. v. Canterbury (Archbp.), 15 East, 159.

(rr) R. v. Wildman, Stra. 879. S. C. 1 Barn. 402. The rule should be for the delivery, &c., to the company, and not to the new clerk. See tit. "Books," &c.

(s) R. v. Wheeler, 3 Keb. 360. See tits. "Charity," "Charter House School," "College," "School," "Visitor."

(t) Town Clerk of Nottingham's case, 1 Sid. 31. R. v. Wheeler, 1 Barn. 99.

which quo warranto will not lie, the right to it may always be tried by a mandamus to give up papers relating to it.(u)

—.] *Deposit*.—So the writ lies to command a public officer to deposit a public document where it is directed to be deposited according to act of Parliament.(v)

—.] *Form of Writ*.—The writ to deliver books, &c., may be directed not only to him who has them, but also to all those who were assistant in carrying them away.(w)

BOOKS OF BOROUGH.] See tit. *Borough (Books)*.

BOOKS OF COMPANY.] See tit. *Company (Books, &c.)*

BOOKS OF COUNTY.] See tit. *County (Accounts, Books, &c.)*

BOROUGH.] This title is arranged as follows :—

BOROUGH.				BOROUGH.			
Borough officers	-	-	50	Rate—Defaulters	-	-	51
Borough fund	-	-	50	Rate Books	-	-	52
Rate	-	-	51	Inspection, &c.	-	-	52
Appeal against	-	-	51	Delivery	-	-	52

—.] *Borough Officers*.—As to the election, &c. of such officers, see post, tit. *Office, &c.*, and stat. 6 & 7 Vict. c. 89.(x)

—.] *Borough Fund*.—The writ lies to command a municipal corporation to pay out of the borough fund certain sums incurred in respect of the expenses or costs of carrying into effect the provisions of stat. 5 & 6 Wm. 4, c. 76. Thus fees which a justice's clerk in a borough is authorized to take, by a table regularly allowed and confirmed under stat. 5 & 6 Wm. 4, c. 76, s. 124, in respect of charges against persons apprehended [*51] and brought *before the borough justices by constables appointed by the watch committee, and disposed of by such justices; and which fees the clerk to the justices cannot recover from such persons or other parties, either on account of their not being specifically imposed on them by act of Parliament, or from their inability to pay, are "expenses necessarily incurred in carrying into effect the provisions of the act" under section 92, and a mandamus will go to direct their payment out of the borough fund.(y) But a mandamus will not lie, to command the pay

Com. Dig. tit. "Man." (A.) (B.); 3 Bl. Com. 110. See tits. "Attorney," "Black-miths' Company," "Company," "Corporation, Municipal" (Insignia), "Insignia," "Records," "Seal." See ante, pp. 27, 28.

(u) R. v. Hopkins, 1 Q. B. 161.† S. C. 4 P. & D. 551, per Pollock, arg., and see there form of writ and return.

(v) R. v. Payne, 6 A. & E. 402.† S. C. 1 N. & P. 524,† per Coleridge, J. See tit. "Act of Parliament," "Attorney."

(w) R. v. Holford, 2 Barn. 350. Anon., 1 Barn. 402. So in the Roman law it is a rule that "Is damnum dat, qui jubet dare: ejus vero nulla culpa est, cui parere necesse sit." D. 50, 17, 169.

(x) Appendix.

(y) R. v. Gloucester (Mayor), 1 D. & M. 677. S. C. 5 Q. B. 862.† S. C. 13 L.

ment over of money to the treasurer of a borough, under stat. 5 & 6 Wm. 4, c. 76, s. 92, unless the application be made either by the treasurer or after he has been required to demand the payment; and this, although the party applying for the writ be ultimately entitled to the money.(z)

—.] *Rate*.—The Court will, in some instances, order the making of a borough rate,(a) but it will not order the payment of past expenses, which would render a retrospective rate necessary.(b) But such an objection can only arise upon the return, for until that time there is nothing to shew, but that there are funds in the hands of the defendants.(b) So the Court will, for a proper purpose, command a corporation to enforce payment of the existing borough rates, or cause to be collected another rate; but such a writ must shew that the existing borough fund is insufficient, or it will be informal, and such an objection may be used as an answer to a rule for an attachment against those who refuse compliance.(c)

—.] *Appeal against Rate*.—It lies to command a recorder, &c. to enter continuances and hear an appeal against a borough rate, where an express power of appeal is given,(d) as by stat. 5 & 6 Wm. 4, c. 76, s. 92,(e) and the subject-matter is not of Ecclesiastical jurisdiction.(f)

—.] *Defaulters*.—So it lies to command justices to issue a distress warrant to levy a borough rate,(g) but where the legality of such a warrant is not clear, the Court will not, by mandamus, command the justices to issue it.(h)

So it lies to command magistrates to issue a warrant of distress for non-payment of **paving and lighting* rates of a borough.(i) But the Court of B. R. will not grant a mandamus to justices of Middle- [*52] sex commanding them to issue such distress warrants for rates made in any district within the metropolis, but will leave the commissioners, or other persons having the control of the pavements of the district, to their remedy by action, under stat. 57 Geo. 3, c. 29, s. 38.(j)

J., N. S. 233, Q. B. But see R. v. Cambridge (Mayor), 14 L. J., N. S. 82, Q. B. R. v. Lichfield, 16 L. J., N. S. 333, Q. B. See R. v. Poole (Mayor), 1 G. & D. 728. S. C. 1 Q. B. 616.

(z) R. v. Frost, 8 A. & E. 822.† S. C. 1 P. & D. 75.

(a) See tits. "County Rate," "Poor rate," &c.

(b) Woods v. Reed, 2 M. & W. 777,* cited in R. v. Gloucester, 1 D. & M. 681. S. C. 5 Q. B. 862.†

(c) R. v. Poole (Mayor), 1 G. & D. 728. S. C. 1 Q. B. 616.†

(d) R. v. Ipswich (R.), 8 D. 103, citing R. v. Surrey (J.), 2 T. R. 504. R. v. Bath (R.), 1 P. & D. 622. R. v. Bond, 6 A. & E. 909.† R. v. Poole (R.), 1 N. & P. 756.† See tits. "Poor Rate," "Quarter Sessions."

(e) R. v. Bond, 6 A. & E. 905.† R. v. Bath (R.), 9 A. & E. 872.† R. v. Carmarthen (R.), 7 A. & E. 756.†

(f) R. v. St. Saviour's, 7 A. & E. 925.† S. C. 3 N. & P. 126. S. C. 1 N. & P. 496.† See tit. "Church-rate."

(g) R. v. Trecothick, 2 A. & E. 405.† R. v. Poole (Mayor), 1 G. & D. 728. S. C. 1 Q. B. 616.† See tit. "Compensation," (Office Payment).

(h) R. v. Dyer, 2 A. & E. 611.† S. C. 4 N. & M. 550.† R. v. Barker, 6 A. & E. 391.† 2 A. & E. 644.† S. C. 4 N. & M. 394.† But see tit. "Quarter Sessions," and stat. 6 & 7 Vict. c. 67, s. 3, App.

(i) R. v. Hughes, 3 A. & E. 425.† S. C. 5 N. & M. 94;† but see 5 N. & M. 126.†

(j) R. v. Middlesex (J.), 5 N. & M. 126.†

—.] *Rate Books, &c. ; Inspection, &c.*—The Court will, under certain circumstances, command inspection and copy of the rate books;(*k*) but the Court must see an interest and right before it will grant it,(*l*) for although the applicants be not strangers as to the documents of which they require inspection, yet they will not be entitled to it, unless some sufficient reason be assigned for allowing it.(*m*)

There must also be a demand previously to the application to the Court.(*n*)

—.] *Rate Books, &c. ; Delivery.*—So the writ lies to command the delivery over of all books, minute books, records, &c. ; and if there be just cause of detention, it must appear by the return.(*o*)

As to freedom, see titles *Corporation (Municipal); Franchise; Freedom; Freeman.*

BOROUGH COURT.] See titles *Courts Inferior; Corporation Municipal.*

BOWLING GREEN.] See tit. *Nuisance.*

BRIDEWELL.] *Governor, Restoration.*—It has been granted to restore to the office of governor of Bridewell in the City of London, it being a royal foundation.(*p*)

BRIDGE.] See titles *Highway; Railway.*

BRIDGE HOUSE ESTATES.] *Clerk, Restoration.*—It lies to command the corporation of London to restore to the office of clerk and comptroller of the Bridge House Estates, if improperly ousted or suspended from his office it *being an ancient office for life, quamdiu se bene gesserit [**53*] in the disposal of the Court of Common Council. The duty being, to superintend and take care of certain estates which are appropriated by the corporation to the support and repair of London Bridge, some of the estates having been granted to the corporation for that express purpose.(*q*) But the writ will not be granted, (although the applicant have been irregularly suspended,) if it appear by his own shewing that there was good ground for the suspension had the proceedings been regular.(*r*)

(*k*) See tits. "Books, Records, &c." "Company," "County Rate."

(*l*) *R. v. Leicester (J.)*, 4 B. & C. 891.† *S. C.* 7 D. & R. 370.† *R. v. St. Marylebone*, 5 A. & E. 268.† *S. C.* 6 N. & M. 600.† *R. v. Staffordsh. (J.)*, 6 A. & E. 85.† *S. C.* 1 N. & P. 60, 277.† This case further restricts, and, to some extent, overrules *R. v. Leicester (J.)* *R. v. Tower Hamlet (Com.)* 3 G. & D. 94. *S. C.* 3 Q. B. 670.†

(*m*) *R. v. Maidstone (Mayor)*, 6 D. & R. 334,† cited in 3 G. & D. 94; and see 3 Q. B. 672.†

(*n*) *R. v. Nottingham (J.)*, 3 A. & E. 500.† *S. C.* 5 N. & M. 160.† See tit. "County Accounts." As to demand and refusal, see post, tit. "Application."

(*o*) *R. v. Ingram*, 1 W. Bla. 49. See *R. v. Wildman, Stra.* 879. Sheriff of Nottingham's case, 1 Sid. 31. *R. v. Green*, 6 A. & E. 548.† *S. C.* 1 N. & P. 631.† See tits. "Books, Records, &c.," "Company."

(*p*) *R. v. Boulton*, 3 Keb. 464. See the exceptions to the return in this case. See tit. "Office."

(*q*) *R. v. London (Mayor)*, 2 T. R. 177. *R. v. London Assurance Company*, 5 B. & A. 900. Bac. Abr. tit. "Man." C. See tit. "Office."

(*r*) 2 T. R. 177, *supra*. *R. v. Cambridge (Chancellor)*, 6 T. R. 99, 100, where one

BRIDGEMASTER'S ACCOUNTS, AUDITOR OF.] See tit. *Auditor, &c.*

BRISTOL.] *Steward of Sheriff's Court of Admission.*—It lies to command the corporation of Bristol to admit to the office of Steward of the Sheriff's Court of the City of Bristol.(s)

—.] *Steward of Tolzey Court of Restoration.*—It lies to command the restoration to the office of Steward of a Court of Record, as to the office of steward of the Tolzey Court of Bristol.(t)

BUILDING ACT.] Where a party had, in pursuance of stat. 14 Geo. 3, c. 78, pulled down and rebuilt a party wall, but had not restored the interior decorations of the adjoining house which had been on the old wall, it was held that a mandamus was not grantable against him at the instance of the tenant of the adjoining house, but that the remedy was by action.(u) As to commanding justices, to set out evidence, &c., on the record a conviction, under stats. 14 Geo. 3, c. 78, and 3 Geo. 4, c. 23, s. 1, see tit. *Conviction.*

BURGESS.] The writ lies for the office of burgess.(v)

*This subject is arranged as follows:—

[*54]

BURGESS.					CAPITAL BURGESS— <i>Restoration</i>	-	56
Election	-	-	-	54	Removal	-	56
Application	-	-	-	54	CHIEF BURGESS		
Admission	-	-	-	54	Election	-	56
Swearing in and admission	-	-	-	55	COMMON BURGESS.		
Enrolling and swearing in	-	-	-	55	Restoration	-	57
Restoration	-	-	-	55	FREE BURGESS.		
Returns	-	-	-	55	Election	-	57
CAPITAL BURGESS.					Admission, swearing in, &c.	-	57
Election	-	-	-	55	INN BURGESS OF WIGAN.		
Election and swearing in	-	-	-	56	Restoration	-	57
Application	-	-	-	56	PRINCIPAL BURGESS.		
Rule	-	-	-	56	Election	-	57

—.] *Election.*—The writ has been often granted to command a municipal corporation to proceed to the election of a burgess,(w) in the room of one deceased.(x) But the Court will not fix a day for such election, but will leave that to the proper officer, and if he do wrong, the parties may then go to the Court and oblige him to act properly.(y)

of the reasons assigned for refusing was, that the applicant had another remedy. And see *R. v. Dr. Gaskin*, 8 T. R. 209. *R. v. Whitestable* (Freefishers), 7 East, 353, 354, n. (a). See tit. "Office" (Restoration).

(s) *R. v. Bristol* (Mayor), 1 D. & R. 389.† See tits. "Courts Inferior," "Manor Court Leet," "Office," "Steward."

(t) *R. v. Griffiths*, 5 B. & A. 731.

(u) *R. v. Ponsford*, 12 L. J., N. S. 313, Q. B. See ante, p. 20, and tit. "Act of Parliament."

(v) Clerk's case, Cro. Jac. 506. Stamp's case, Raym. 12. *R. v. Tiddlerley*, 1 Sid. 14. *R. v. Wilton* (Burgesses), 5 Mod. 257. Com. Dig. tit. "Man." (A.) See stat. 9 Anne, c. 20, s. 1, App. See tit. "Office."

(w) *R. v. Bridgenorth* (Mayor), 2 Chit. 256.† See tits. "Corporation, Municipal," "Office," and stat. 6 & 7 Vict. 89, Appendix.

(x) *R. v. Evesham* (Corp.), Kely. 243.

(y) 2 Chit. 256, supra, Stra. 948. See tits. "Alderman," "Office."

So it has been granted to command a corporation, &c. to enter an adjournment to some subsequent convenient day, and on that day to hold a meeting and receive and examine certain proofs offered by applicants for the office of burgess, and to hear and determine the matter of such applications.(z)

—.] *Application*.—Where the application is for a mandamus to proceed to the election of a burgess in the room of one deceased, the motion is of course, and ex debito justitiæ, so that the Court cannot nor will impose any terms upon the applicant.(a)

—.] *Admission*.—When the applicant has an inchoate right by birth or servitude to be admitted a burgess, the Court of B. R. will grant a mandamus to command the perfection of such right; but such right must clearly appear. Thus where the inhabitant of a borough applied for a mandamus to the mayor and steward of the borough to enrol and swear him at a Court Leet thereof as a resident and burgess, but did not make out an inchoate right in every inhabitant to be a burgess, or that any such connexion existed between the corporation and the Court Leet as would make swearing and enrolment at the latter, the means of perfecting such right; therefore the Court refused the writ.(b) [* 55] So a burgess being an officer within the stat. 12 Geo. 3, c. 21, s. 1, is thereby entitled to a mandamus for his admission.(c).

—.] *Swearing in and Admission*.—So it has been granted to command the lord and steward of a manor to swear in and admit certain burgesses presented by the jury of the Court Leet.(d)

—.] *Enrolling and Swearing in*.—It lies to command a corporation to enrol and swear in the prosecutor as a resident and burgess at the next Court Leet to be holden for the borough, if it would confer upon him a valuable franchise, as the privilege of voting at the election of Members of Parliament.(e)

—.] *Restoration*.—So it will be granted on a proper case being shewn to restore to the office of Burgess.(f)

(z) R. v. Carmarthen (Mayor), 1 M. & S. 696.

(a) Kel. 243, supra. R. v. Grampound (Mayor), 6 T. R. 302. See tit. "Application," and stat. 6 & 7 Vict. c. 89, Appendix, where the practice is given.

(b) R. v. West Looe (Mayor), 3 B. & C. 681, 684.† S. C. 2 D. & R. 181, 182.† S. C. 5 D. & R. 590.† R. v. Lord Montacute, 1 W. Blac. 61. R. v. Physicians (College), Burr. 2186. Anon. Lofft, 148. R. v. Doncaster (Mayor), 7 B. & C. 630.† S. C. 5 M. & R. 545. R. v. Malmesbury (Aldermen), 3 G. & D. 482. S. C. 3 Q. B. 577.† S. C. 11 L. J., N. S. 318, Q. B. Bac. Abr. tit. "Man." (C.)

(c) See stat. App. as to notice of application and costs. R. v. Lord Montacute, 1 W. Blac. 64. S. C. 1 Wils. 283. See tits. "Act of Parliament," "Office."

(d) R. v. Beaufort (Duke), 5 B. & Ad. 442.† S. C. 2 N. & M. 815.† where see form of writ.

(e) R. v. West Looe, 5 D. & R. 590.† S. C. 3 B. & C. 677,† supra. See tit. "Ale-taster."

(f) R. v. Chalk, Comb. 396. R. v. Wilton (Mayor, &c.), 5 Mod. 257. S. C. 2 Salk. 428. S. C. 1 Ld. Raym. 225, nom. R. v. Chalke. R. v. Pomfret (Mayor), 10 Mod. 107. R. v. Truebody, 11 Mod. 75. S. C. Lord Raym. 1275. S. C. Holt, 449. R. v. Shaw, 12 Mod. 113. Bagg's case, 11 Rep. 93 b. Colchester's case, 1 Rolle, 335. R. v. Tiddlerley, 1 Sid. 14. R. v. Halse, 1 Keb. 20, pl. 56. R. v. Phillingham, 1 Keb. 777. R. v. Allborough (Baliffs), 1 Keb. 308. Taylor's case, Poph. 133. R. v. Liverpool (Mayor), Burr. 730. R. v. Derby (Mayor), 2 Salk. 436. 18.

——. *Returns*.—But to such a writ, it is a good return, that the prosecutor was de facto elected, but that not having received the Sacrament according to stat. 13 Car. 2, c. 2, his election is void, for it is a precedent qualification.(g) So it is a good return, that the prosecutor has totally deserted the borough.(h)

CAPITAL BURGESS.] *Election*.—It lies for a capital burgess.(i) Thus it lies to command a proceeding to the election of a capital Burgess.(j) So in a case where two vacancies were occasioned by the deaths of two capital burgesses, and this, though there was a quo warranto information *depending against the mayor, questioning his title.(k) [*56] But the Court will not fix the time of election.(l)

——.] *Election, and swearing in*.—It also lies to command both the election and swearing in to such office.(m)

——. *Application*.—The application should in every case be supported by an affidavit, stating the whole of the facts,(n) but the rule is granted as of course, unless some special reason be assigned to induce a refusal of it.(o)

——. *Rule*.—The rule is absolute in the first instance.(p)

——.] *Restoration*.—It lies to command restoration to the office of Capital Burgess,(q) and a return to such a writ, that he wrote a libel on one of the aldermen, and that therefore he consented to be turned out, is bad, for a common council cannot try a libel, and a resignation by parol must be certain.(r)

——.] *Removal*.—It does not lie to command a municipal corpora-

(g) *R. v. Buckingham (Corp.)* 10 Mod. 173. *R. v. Pomfret (Mayor)*, 10 Mod. 107, 108. *R. v. Aldborough (Borough)*, 10 Mod. 100. See tit. "Office" (Restoration).

(h) *R. v. Truebody*, 11 Mod. 75; *Ld. Raym.* 1275. *S. C.* Holt, 449; 1 Doug. 144, 569. *City of Exeter v. Glide*, 4 Mod. 36. *S. C.* 1 Show. 258; 1 Show. 364. *R. v. Leicester (Mayor)*, Burr. 2087, and Burr. 530. See tit. "Office" (Restoration Returns).

(i) *Devises' case*, 2 Keb. 725. See ante, p. 53, and stat. 6 & 7 Vict. c. 89, App.

(j) *Hlchester's case*, 2 Chit. 257,† n. (a). *Anon.* 1 Barn. 227. *R. v. Doncaster (Mayor)*, 1 Barn. 264. *R. v. Esham (Mayor)*, 2 Barn. 265. *R. v. Evesham (Borough)*, Str. 948.

(k) *R. v. Grampound (Mayor)*, 6 T. R. 301. *R. v. Truro (Mayor)*, 3 B. & A. 592.

(l) Ante, p. 54. *Stra.* 948; 2 Chit. 256,† supra. See tit. "Office."

(m) *R. v. Truro (Mayor)*, 3 B. & A. 590.

(n) 1 Barn. 227, supra. See tit. "Application" (Affidavits).

(o) *R. v. Grampound (Mayor)*, 6 T. R. 303, 309.

(p) *Anon.* 1 Barn. 227. See tit. "Rule."

(q) *R. v. Allborough (Baliffs)*, 1 Keb. 308. *S. C.* 10 Mod. 100. *R. v. Truebody*, Holt, 449. *R. v. Gloucester (Mayor)*, Holt, 450. *R. v. Lyme Regis (Mayor)*, 1 Doug. 79, 134, 177. *R. v. Grampound (Mayor)*, 7 T. R. 699. *R. v. Doncaster (Mayor)*, Burr. 738. *R. v. Lane*, 11 Mod. 270. *S. C.* Fort. 275. *S. C.* *Ld. Raym.* 1304. *R. v. Vicars*, 11 Mod. 214. *R. v. Carlisle*, 11 Mod. 378. *S. C.* 8 Mod. 19, 99. *S. C.* Fort. 200, 201, 204. *S. C.* *Stra.* 385; *Ld. Raym.* 415, 1283; *Fitzg.* 190. *Exeter (City) v. Glide*, 4 Mod. 37. *Morris' case*, 7 Wm. 3, M. T., there cited.

(r) 11 Mod. 270. *S. C.* Fort. 275. *S. C.* *Ld. Raym.* 1304. As to what are the subjects of return to such writ, see 11 Mod. 214, and 11 Rep. 93, b., supra. As to returns of resignation, see 11 Mod. 270; *Ld. Raym.* 563. *S. C.* *Salk.* 433. See a form of return, 1 Doug. 177. As to the dismissal of a burgess, see *Bull. N. P.* 204. See tit. "Office" (Restoration Returns).

tion to assemble themselves together within their borough, and consider the propriety of removing certain persons by name from the office of capital burgess on the ground of non-residence within the borough, if there be vested in such corporation, a discretionary and not a compulsory power of amotion, because in such a case the Court of B. B. has no authority to interfere and order an amotion, unless the corporation be misgoverned.(s)

CHIEF BURGESS.] *Election*.—It lies to command a municipal corporation to convene a meeting and elect chief burgesses,(t) and to such a mandamus a return, which after stating objections to the titles of several of the remaining burgesses, alleged that they were not within the borough eight legally *elected chief burgesses, by whom the election of others could be made, and, that, therefore, such election could not be proceeded with, was held insufficient.(u)

COMMON BURGESS]. *Restoration*.—It lies to restore to the office of common burgess.(v)

FREE BURGESS.] *Election, &c.*—It lies to command the Mayor, &c., of a borough, to proceed to the election of a competent number of free burgesses of the borough, or to hold a meeting for the purpose of considering the propriety of proceeding to such an election.(w)

—.] *Admission and swearing in*.—So it lies to command the admission and swearing in of a free burgess to his office, if duly qualified.(x)

INN BURGESS OF WIGAN.] *Restoration*.—So it has been granted to command the inn burgesses of Wigan to attend a Court Lect, to make a jury.(y) It has been granted to restore an inn burgess of Wigan to his office.(z)

PRINCIPAL BURGESS.] *Election*.—It has been granted to command a corporation to proceed to the election and swearing in of a principal burgess in accordance with a charter, and of stat. 11 Geo. 1, c. 4, s. 2, although the day of election had elapsed.(a)

(s) R. v. West Looe, 5 D. & R. 414,† citing and confirming. R. v. Portsmouth (Mayor), 4 D. & R. 767.† And see 5 D. & R. 481. See tits. "Alderman" (Removal), "Office" (Deprivation).

(t) R. v. Monmouth (Mayor), 4 B. & A. 496. See ante, p. 54, and stat. 6 & 7 Vict. c. 89, App.

(u) 4 B. & A. 496, supra.

(v) R. v. Buckingham (Mayor), 10 Mod. 173. See tit. "Office" (Restoration).

(w) R. v. Fowey (Mayor), 2 B. & C. 587.† See ante, p. 54, and stat. 6 & 7 Vict. c. 89, App.

(x) R. v. Doncaster (Mayor), 5 M. & R. 545. S. C. 7 B. & C. 630.† R. v. West Looe (Mayor), 2 D. & R. 178.† S. C. 3 B. & C. 681.† See tit. "Office" (Admission).

(y) Rector of Wigan's case, Stra. 1207. S. C. Wils. 76. And see 1 W. Blac. 64, n. (l). See tit. "Jury." (z) R. v. Holmes, Burr. 1641.

(a) See stat. App. R. v. Thetford (Mayor), 8 East, 270. Scarborough's case, Stra. 1180. R. v. Woodrow, 2 T. R. 732; 1 Roll. Abr. 513, 514. See ante, p. 54, and stat. 6 & 7 Vict. c. 89, App.

BURGESS ROLL]. This subject is arranged as follows :—

BURGESS ROLL.				BURGESS ROLL—			
Insertion of Name	-	-	57	Writ	-	-	59
Inspection, &c.	-	-	58	Return	-	-	59
Restoration of name	-	-	58	Costs	-	-	59
Application	-	-	58	Assessors	-	-	59
				Election	-	-	59

—.] *Insertion of Name.*—It lies to command the insertion of a name in the burgess roll of a borough(*b*) under stat. 1 Vict. c. 78, although no burgess *list, or an imperfect one has been made out.(*c*) Thus where the overseers of one of several parishes in a [*58] borough omitted to make out the burgess list required by stat. 5 & 6 Wm. 4, c. 76, s. 15, so that at the revision Court of the mayor, there was no list in which the name of the claimant for the parish could be inserted. It was held, that this intermediate defect in his title to be on the general burgess roll, which is made up of the several parish lists, did not preclude the Court from issuing a mandamus, to command the insertion of his name under 1 Vict. c. 78, s. 24, for the statute gives jurisdiction as well where the claim of a party has been rejected as where his name has been expunged.(*d*)

And the Court will make absolute a rule for a mandamus for such purpose, although the year for which such burgess roll was made out, have expired since the granting of the rule nisi, and the mayor be dead to whom the rule was directed, and notwithstanding, no application has been made to the present mayor.(*e*)

—.] *Inspection.*—The writ lies to allow the burgess to inspect the voting papers deposited with a town clerk, and to compare his own with those produced, and to take copies, and make corrections.(*f*)

—.] *Restoration of Name.*—The Court will not grant a mandamus under stat. 7 Wm. 4 and 1 Vict. c. 78, c. 24, to reinstate a name which has been expunged from the burgess roll, unless the applicant prove his title, although his name may have been expunged upon an invalid notice of objection, for the Court is bound by such statute to inquire into the title.(*g*)

(*b*) See stat. App. R. v. Hythe (Mayor), 5 A. & E. 832.† S. C. 1 N. & P. 239.† R. v. Harwich (Mayor), 1 P. & D. 134. S. C. 8 A. & E. 919.† R. v. Bridgenorth (Mayor), 2 P. & D. 317. S. C. 10 A. & E. 66.† R. v. Eye (Mayor), 2 P. & D. 348. S. C. 9 A. & E. 670,† where see the direction of writ. R. v. Litchfield (Mayor), 1 G. & D. 28. S. C. 1 Q. B. 453.† S. C. 11 L. J., N. S. 122, Q. B. And see 2 Q. B. 693.† S. C. 2 G. & D. 10. R. v. New Windsor (Mayor), 13 L. J., N. S. 337, Q. B. S. C. 7 Q. B. 908.† S. C. 14 L. J., N. S. 319, Q. B. Com. Dig. tit. "Man." (A.) See Townsend's case, 1 Lev. 91. R. v. Dover (Mayor), 16 L. J., N. S. 97, M. C., where see form of writ.

(*c*) 1 G. & D. 28. S. C. 1 Q. B. 453.† S. C. 11 L. J., N. S. 122, Q. B. And see R. v. Dover (Mayor), 16 L. J., N. S. 101, M. C.

(*d*) R. v. Litchfield (Mayor), 1 G. & D. 28. S. C. 1 Q. B. 453.† S. C. 5 Jur. 889. S. C. 11 L. J., N. S. 122, Q. B.

(*e*) R. v. Eye (Mayor), 2 P. & D. 348. S. C. 9 A. & E. 670.†

(*f*) R. v. Arnold, 4 A. & E. 657.† The rule is not absolute in the first instance.

(*g*) R. v. Harwich (Mayor), 1 P. & D. 134. S. C. 8 A. & E. 919,† 1 G. & D. 28.

So, where the name of certain burgesses duly qualified in other respects were objected to, and expunged from the burgess lists on revision, on account of non-payment of the shilling required by stat. 2 Wm. 4, c. 44, s. 56, and in the succeeding mayoralty, before fresh assessors were elected, application was made for a mandamus to restore the name, on a suggestion that the objection was invalid, it was held, (before stat. 7 Wm. 4 and 3 Vict. c. 78,) that the Court had no power to grant the writ in such a case.(h)

— *Application*.—The application for the writ must be made before the end of the term following the rejection or expunging of the name;(i) as it would seem that the statutes regulating this subject, contemplated a *speedy remedy, and to impose on the Court the duty [*59] of inquiry into the prosecutor's title by affidavit.(j)

— *Writ*.—The writ is not in any case peremptory in the first instance.(k)

— *Return*.—When the writ is not to receive a claim for insertion, but to restore a name improperly expunged, the return must state the grounds of disqualification, with certainty and particularity, so, that if the disqualification be the non-payment of rates, the return must set forth the times when they were made, and how the prosecutor was assessed to and became liable to pay them.(l)

— *Costs*.—The Court has refused to award costs against a mayor in an application to insert a name in a burgess list, where it did not appear that the mayor had acted improperly.(m)

ASSESSORS]. *Election*.—It lies to command the election of assessors to assist in the revision of the burgess lists, pursuant to stat. 7 Wm. 4 and 1 Vict. c. 78.(n)

BURIAL.] It lies to command the rector, officiating curate, churchwardens and sexton of a parish to do every act necessary to be done in order to due burial in the churchyard, or other usual burial ground of the parish of the corpse of the late parishioner, because burial in the parish churchyard in the prescribed mode, which usage and custom has sanctioned, is a common law right inherent in the parishioners, and by award-

S. C. 1 Q. B. 453,† supra. And see stat. 7 Wm. 4 and 1 Vict. c. 78, s. 24. App., as to time within which the application is to be made, and as to costs of application.

(h) 5 A. & E. 832,† S. C. 1 N. & P. 239,† supra. See ante, p. 10.

(i) Stat. 1 Vict. c. 78, s. 24, App. See tit. "Application" (when made).

(j) R. v. Dovor (Mayor), 16 L. J., N. S. 101, M. C. R. v. Eye (Mayor), 9 A. & E. 670,† S. C. 8 L. J., N. S., Q. B. 142.

(k) 9 A. & E. 670, 675, 677, 679,† S. C. 2 P. & D. 348, supra; 1 G. & D. 28. S. C. 1 Q. B. 453,† supra. See stat. 1 Vict. c. 78, s. 24. See tit. "Peremptory Mandamus."

(l) R. v. Dovor (Mayor), 16 L. J., N. S. 97, M. C. See tit. "Office" (Restoration Return).

(m) R. v. Lichfield (Mayor), 6 Jur. 624. See tit. "Costs."

(n) R. v. Weymouth (Mayor), 7 Q. B. 46,† S. C. 14 L. J., N. S. 353, Q. B. See stat. 6 & 7 Vict. c. 89, App.

ing the writ in this case the Court of B. R. acts in aid of the Ecclesiastical Court, for that Court would compel the burial but not in so speedy a manner as by mandamus.(o)

But the mode of burial being purely of Ecclesiastical cognizance, this Court will refuse a mandamus to inter the body of a parishioner in a particular and unusual manner, as in an iron coffin.(p)

So, it does not lie to command the burial of the corpse of a parishioner in *a vault, or in any particular part of a churchyard, as the rector has a right to exercise his discretion as as to place.(q) [*60]

Neither does it lie to command the overseers of the poor of a parish to remove from an hospital within the parish, and cause to be interred the body of a deceased pauper, because they are not bound either by common law, or by stat. 43 Eliz. c. 2, to bury a pauper settled in the parish, and who dies there, unless such pauper, die in a parish house.(r)

As to detention of corpse, see tit. *Corpse*.

BUTCHERS' COMPANY.] *Clerk, Restoration*.—It does not lie to restore to the office of clerk of the Butcher's Company in London.(s) The Court in its judgment said, that if it be an office of freehold, an assize may be had, or an action on the case, and if it be not an office of freehold, then it is private service, which does not concern the public.(t)

BYE-LAWS.] See tit. *Corporation Municipal*.

CALLS.] See tit. *Company*.

CANAL COMPANY.] *Duties, &c.*—The writ will be granted to command a canal company to enrol according to its act of Parliament, all contracts, agreements, sales, conveyances, and assurances, relating to certain purchased land; and after a lapse of sixty-five years from the time of such purchase, during which time no application has been made to the company, the Court will refuse to grant such a mandamus on the refusal of the company, so to enrol, &c.(u) So it will be granted to com-

(o) R. v. Coleridge, 1 Chit. 588.† S. C. 2 B. & A. 806, 808,† per Abbott, C. J. Ex parte Blackmoor, 1 B. & Ad. 122.† R. v. Stewart and Another, 4 P. & D. 349. Anon. 3 A. & E. 552.† See Andrews v. Cawthorne, Willes, 536. Degge's Parson's Law, pt. 1, c. 12. Burn's Eccl. L., tit. "Burial," 258. Com. Dig. tit. "Cemetery," (B.) Dean, &c., of Exeter's case, 1 Salk. 334. And see R. v. Exeter (Ep.), Palm. 51. The Complete Incumbent, 381, ed. 1795. Bac. Abr. tit. "Man." (C. 2).

(p) See note (o), supra, ante, p. 22. R. v. London (Ep.), 1 Wils. 11. R. v. Thetford (Churchwardens), 5 T. R. 364. R. v. Canterbury (Archbishop), 8 East, 212, 219. See tit. "Charch-rate."

(q) Ex parte Blackmoor, 1 B. & Ad. 122.† (r) R. v. Stewart, 4 P. & D. 349. S. C. 10 L. J., N. S. 40, M. C. Anon. 3 A. & E. 552.†

(s) R. v. White, 3 Salk. 232. S. C. 6 Mod. 18, also cited in R. v. London (Mayor), 2 T. R. 182, n. (b). Bac. Abr. tit. "Man." (C.) See tit. "Poor."

(t) But see tit. "Masons' Company," &c. R. v. White, Ld. Raym. 1004, where it says the mandamus was granted, the Court saying it was the same as a town clerk. See tits. "Company" (Clerk of Private), "Office."

(u) R. v. Leeds Canal, 3 P. & D. 174. S. C. 11 A. & E. 316.† See tit. "Act of Parliament," "Application."

mand a company to maintain and repair certain parts of the banks of their canal,^(c) and this although there may be another remedy by indictment; for if such breach of contract also cause a public nuisance that fact cannot dispense with the necessity of a specific performance of the obligation contracted by them on obtaining their act.^(w)

—.] *Compensation.* See tit. *Compensation, (Company.)*

—.] *Tolls.*—It also lies to command such a company to establish an uniform rate of tolls along the whole line of their canal, &c.^(x)

[*61] *CANON]. *Admission, &c.*—It lies to admit to a canonry or prebend, and to institute, induct and invest therein.^(y) But it does not lie to command the admission of a canon to his stall, on a custom to choose a supernumerary, when all the stalls are full, until a vacancy should happen,^(z) the mandamus being refused, because the Court held such custom to be ridiculous and void.

—.] *Restoration.*—It lies not to command a visitor to restore a canon whom he has deprived, for a visitor has an absolute power within his jurisdiction.^(a)

CANONS, RESIDENTIARY]. *Election.*—It lies to command the filling up a vacancy among the canons residentiary in proper time, and on such a mandamus the Court will compel an election at the peril of those who resist.^(b) But there must not exist a remedy in the Spiritual or other Courts, or one by quare impedit.^(c)

—.] *Election as Dean.*—It lies also to command the proceeding to the election and admission of one to be dean, and, if necessary, to elect, collate and admit him to be a canon residentiary.^(d)

CANTERBURY—COURT OF THE CITY OF.] See titles *Attorney; Courts Inferior.*

CAPITAL BURGESS]. See tit. *Burgess (Capital).*

(v) *R. v. Bristol Dock*, 2 Q. B. 64,† S. C. 1 G. & D. 286. *R. v. Bristol Dock*, 6 B. & C. 181,† S. C. 9 D. & R. 309,† *R. v. Severn Railway*, 2 B. & A. 646,† and see *R. v. Manchester Railway*, 3 G. & D. 269. S. C. 3 Q. B. 528,† See tit. “Railway.”

(w) 2 Q. B. 64,† S. C. 1 G. & D. 286. See ante, p. 24, and tit. “Act of Parliament.”

(x) *Clarke v. Leicestershire Canal*, 6 Q. B. 899,† and see tit. “Tolls.”

(y) *Clarke v. Sarum (Ep.)*, Stra. 1081. S. C. Andr. 20. 185. See tit. “Prebendary, Cox’s case, E. T. 1659, cited in *R. v. Stenhowe*, 2 Show. 199.

(z) *R. v. Stenhowe*, 2 Show. 199. S. C. Skin. 45. S. C. Sir T. Jon. 199.

(a) *R. v. Chester (Ep.)*, 1 Wils. 296. S. C. 1 W. Bla. 21. *Broadoaks or Brideoak’s case*, H., 12 Anne, there cited, per Wright, J. Philips and Bury, Ld. Raym. 5. S. C. 2 T. R. 346. S. C. Skin. 447, 475. Show. P. C. 35. See tit. “Visitor.”

(b) *Chichester (Ep.) v. Harwood*, 1 T. R. 652, per Buller, J., also cited in *R. v. Stenhowe*, 2 Show. 200, n. (a), 3rd ed. *Chichester’s case*, Lofft, 253. See tit. “Prebendary.”

(c) See ante, p. 22, 26. *R. v. St. Peter’s, Exeter*, 12 A. & E. 525,† S. C. 9 L. J., N. S. 368, Q. B.

(d) *R. v. St. Peter’s Exeter*, 12 A. & E. 512,† S. C. 4 P. & D. 253. See tit. “Dean.”

CAPITAL CITIZENS.] See tit. *Citizen (Capital)*.

CARRIERS.] *Appeal*.—It lies to command justices at quarter sessions to enter continuances and hear an appeal against a conviction under stat. 50 Geo. 3, c. 48, s. 4, for carrying more luggage than allowed by the act.(*e*)

As to the carriage of goods, see tit. *Railway (Goods)*.

CATHEDRAL STALL.] *Admission*.—It lies to command an admission to a cathedral stall, and to a voice in the chapter.(*f*)

*CASE. See titles *Quarter Sessions (Case)*; *Poor (Case)*, and [**62*] *ante*, p. 21.

CERTIFICATE.] Where a power is delegated to grant a certificate, the Court will by mandamus, enforce the due granting thereof.(*g*)

CERTIORARI.] Where a statute does not allow a removal of proceedings by certiorari, the Court will not, by means of a mandamus to justices, &c., commanding them to hear, &c., bring them under review.(*h*)

But it would seem that it will be granted to command justices, &c., to amend their return to a certiorari, by commanding them to return the information on which a conviction is founded, and also to set forth on the face of the conviction, the evidence given touching the entry in the conviction mentioned; but in such a case there must be proof that evidence was in fact taken, but that it has been set out in the words used by the witnesses.(*i*)

CHAMBERLAIN.] The writ of mandamus lies for the office of chamberlain(*j*).

—.] *Election*.—Thus it will be granted to command the proceeding to an election of chamberlain under stat. 11 Geo. 1, c. 4, s. 2.(*k*)

—.] *Admission*.—It also will be granted to command the bailiffs or other proper officers of a corporation to admit to the office of chamberlain.(*l*)

(*e*) *R. v. Essex (J.)*, 4 B. & A. 276. See tit. "*Quarter Sessions*," (*Appeal*).

(*f*) *R. v. Dublin (Dean)*, Stra. 536. S. C. 1 P. Wms. 348, cited in *R. v. London (Ep.)*, 1 Wils. 13. See tits. "*Dean*," "*Prebendary*."

(*g*) *R. v. Canterbury (Mayor)*, M., 1 Geo. 1 cited in *R. v. London (Ep.)*, 1 Wils. 13. S. C. Stra. 1192. But see *R. v. Divisional Justices*, 1 Al. & Nap. See tits. "*Act of Parliament*," "*Ship*," (*Certificate*, &c.)

(*h*) *Ex parte Pratt*, 2 N. & P. 102. *R. v. West R. (J.)*, 1 A. & E. 563.† S. C. 3 N. & M. 802,† cited in *R. v. Sheffield Railway*, 11 A. & E. 196,† and in *R. v. Cheltenham Commissioners*, 1 Q. B. 471.† See tits. "*Game Laws*," "*Quarter Sessions*."

(*i*) *R. v. Wilson*, 3 N. & M. 753.† In *re Rix*, 4 D. & R. 352.† *R. v. Warnford*, 5 D. & R. 489,† also cited in 3 N. & M. 756.† See tit. "*Conviction*."

(*j*) *Scarborough's case*, Stra. 1180. Com. Dig. tit. "*Man*." (A.) See tit. "*Office*."

(*k*) Note (*j*), and post, tit. "*Office*" (*Election*), and stat. 6 & 7 Vict. 89, App.

(*l*) *R. v. Bridgnorth (Bailiffs)*, 1 Barn. 53.

As to the office of auditor of chamberlain's accounts, see tit. *Auditor*, &c.

CHANCERY, INN OF.] See tit. *Inn of Chancery*.

CHAPEL.] *Enrolment*.—The writ will be granted to command the enrolment of a chapel under the act for liberty of conscience.(*m*)

CHAPELWARDENS.] *Swearing in*.—It lies to command the swearing in of chapelwardens by administering to them the declaration required by stat. 5 & 6 Wm. 4, c. 62, s. 9, and the rule (in analogy with the case of churchwardens) was made absolute in the first instance, although other persons also claimed to have been duly elected.(*n*)

*CHAPLAIN.] *Appointment*.—It lies to nominate and appoint [*63] a chaplain to perform divine service where the office is a freehold, with a permanent fund for payment;(o) and the Court will grant the writ even when it is not clear that the cure is not already full.(*p*) It lies also to command the guardians of an union to appoint a chaplain pursuant to an order of the poor law commissioners, such chaplain being an officer within the meaning of the stat. 4 & 5 Wm. 4, c. 76, s. 46, interpreted by sect. 109.(*q*) So it lies to command the appointment of a chaplain, pursuant to the terms of a charter.(*r*)

—.] *Admission*.—It lies also to command the admission of a chaplain.(*s*) And it lies generally to admit a chaplain where there is no visitor, or no visitatorial power in being, as were the visitatorial power is suspended by the union of the office of visitor with that to which the mandamus is to be directed.(*t*)

—.] *To perform Duties, &c.*—It also lies to command justices to permit the chaplain of a county lunatic asylum to perform the duties of his office. But not if he have been subsequently dismissed by such justices, inasmuch as by stat. 9 Geo. 4, c. 40, ss. 30, 32, they have the discretionary power of appointing and dismissing such chaplain.(*u*)

(*m*) R. v. Green, Skin. 670. See tit. "Dissenters."

(*n*) Ex parte, Duffield, &c., 6 N. & M. 865.† S. C. 3 A. & E. 617,† citing R. v. Middlesex (Archdeacon), 3 A. & E. 615.† S. C. 5 N. & M. 494.† Ex parte Penruddock, 1 H. & W. 347. See tit. "Churchwardens."

(*o*) R. v. Davie and Others, 6 A. & E. 374.† See tit. "Parson." As to chaplain of College, see tit. "College" (Chaplain).

(*p*) Note (*o*).

(*q*) 4 P. & D. 593.† S. C. 1 Q. B. 130,† supra. R. v. Poor Law Commissioners, 9 A. & E. 911,† there cited and distinguished.

(*r*) R. v. Sandford (Governors), 1 N. & P. 328.† S. C. W. W. & D. 177. R. v. Braintree Union, 4 P. & D. 593. S. C. 1 Q. B. 130.† See tit. "Charter," and ante, p. 11.

(*s*) R. v. Baker, Burr. 1267. Per Mansfield, C. J. R. v. Chester (Ep.), Stra. 797. See tit. "Office" (Admission).

(*t*) Stra. 797. S. C. 1 Barn. 52, supra. Com. Dig. tit. "Man." (A.) See also Andrews, 181, and stat. 2 Geo. 2, c. 29. See tit. "Visitor."

(*u*) R. v. Middlesex Lunatic Asylum (V. J.), 2 G. & D. 300. S. C. 2 Q. B. 433.† S. C. 11 L. J., N. S., 30, M. C.

—]. *License*.—It also lies to command a bishop or other officer to license one to be the chaplain of a gaol, if a proper and fit person to be such chaplain, and he have been refused without cause.(v)

CHARITY]. It lies in some cases to enforce a legal right under a private institution, as a charity,(w) as to command a visitor to hear an appeal.(x) But where the right is equitable merely, the Court of B. R. will not interfere by mandamus. Thus the Court refused to command the trustees of the Rugby charity to pay increased alms of the claimants on the funds, *although the applicants were at an advanced age, and would probably be dead before relief could be had in [64] Chancery.(y)

So it lies to command the delivery to churchwardens, or one of them, of a key of the coffer or chest containing the writings, accounts, and moneys of and relating to a private charity, but the legal right of the churchwardens to the same must be made out.(z) Thus where in pursuance of the will of a private person, his executor by deed, conveyed land to trustees for the benefit of the poor of a parish, the deed provided that a chest to which there should be attached three locks and three keys, should remain in the parish church for keeping all writings, accounts, &c., and the trust moneys remaining unexpended; that one of such keys should be kept by the receiver, the second by the parson, and the third by the churchwardens. It was held that a mandamus lay to the trustees to command the delivery of one key to one of the churchwardens although the application concerned the trust of a charity which was but a private endowment; the claim of the churchwardens, however, being not merely equitable but legal.

CHARTERS.] This writ is the proper remedy to enforce obedience to the Queen's charters, and, in such cases, is demandable ex debito justitiæ,(a) but not to supply a casus omissus from such charter.(b)

As to chartered companies, see titles *Amicable Assurance Company; Company*.

CHARTER HOUSE SCHOOL.] *Restoration of Scholar*.—It lies not to

(v) R. v. Bath (Ep.), 1 D. & M. 173. S. C. 5 Q. B. 147.† S. C. 12 L. J., N. S. 324, Q. B. See tit. "Lectureship." R. v. Blooer, Burr. 1045. Lord Raym. 1205, 1206. R. v. Exeter (Ep.), 2 East, 462. R. v. Oxford (Ep.), 7 East, 345.

(w) R. v. Ottery St. Mary, 3 G. & D. 382. S. C. 4 Q. B. 157.† S. C. 12 L. J., N. S., 118 Q. B. Ex parte Rugby Charity, 9 D. & R. 214.† See tit. "Institutions" (Private).

(x) R. v. Worcester (Ep.), 4 M. & S. 415. See tit. "Blue Coat School."

(y) Ante, p. 27. Ex parte Rugby Charity, 9 D. & R. 214.†

(z) 3 G. & D. 382. S. C. 4 Q. B. 157.† S. C. 12 L. J., N. S. 118, Q. B. See tit. "Church" (Keys).

(a) Ante, p. 11, Bull. N. P. 199. Cas. temp. Hard. 99; Burr. 2189; 8 East. 270; Bac. Abr. tit. "Mandamus," 257. See tits. "Acts of Parliament," "Chaplain."

(b) Ante, p. 31. Bagg's case, 11 Rep. 99. R. v. Arnauld, 16 L. J., N. S. 50, Q. B.

restore a boy to the Charter House, he being but an almsman, and under the jurisdiction of a visitor.(c)

CHESTER—COURT OF COUNTY PALATINE OF.]—See tits. *Attorney*; *Courts' Inferior*.

CHIEF BURGESS.] See tit. *Burgess (Chief)*.

CHRISM.] The Court has by mandamus, commanded a bishop to give the chrism, *i. e.* oil, with which to baptize the parishioners' children, although the archbishop might have been appealed to.(d)

[*65] *CHURCH.] This subject is arranged as follows:—

CHURCH.						CHURCH—Rates in nature of Church-					
Keys	-	-	-	-	65	rate	-	-	-	66	
Burial	-	-	-	-	65	Returns	-	-	-	67	
Church Trustees	-	-	-	-	65	Recovery of rate	-	-	-	67	
Duty, &c.	-	-	-	-	65	Loans	-	-	-	67	
Church-rate	-	-	-	-	65	Rates for payment	-	-	-	67	
Making	-	-	-	-	65	Returns	-	-	-	68	

—.] *Keys*.—A mandamus lies to command the delivery of the keys of a church.(e)

As to burial in a church, &c., see tit. *Burial*.

—.] *Church Trustees, Duty, &c.*—It lies to command trustees under certain acts of Parliament for building a church, &c., to attend, in pursuance of the act, a meeting of the auditors of accounts of the parish, and bring with them, and produce at such a meeting, the book or books containing an account of all moneys received, and of all moneys paid during the last half-year.(f)

—.] *Church-Rate, making*.—The writ will not, at common law, be granted to command the making, by churchwardens, of a church-rate, not only because it is a subject purely of ecclesiastical cognizance, but also because all that can be legally required of them is that they shall call a meeting of the parishioners, for the purpose of considering the propriety of making a rate; for they have not a legal capacity to make a rate without the sanction of the vestry.(g) The Court will, however, grant it to

(c) *R. v. Wheeler*, 3 Keb. 360. See tits. "Blue Coat School," "Charity," "College."

(d) *R. v. Exeter*, (Ep.), Palm. 51, temp. 26 Edw. 3, where see form of Writ, cited in *R. v. Coleridge*, 2 B. & A. 807;† and in *R. v. Patrick*, 2 Keb. 165, per Moreton, J.; and in *Mr. Amherst's case of Gray's Inn*. 1 Vent. 187, cited in *R. v. Dublin (Dean)*, 8 Mod. 28. See tits. "Bishop," "Confirmation," "Sacrament." See ante, p. 21.

(e) *Anon.*, 2 Chit. 255.† The Court advised a new key to be got, but at the time said that if the granting the writ would prevent a breach of the peace, it should be granted. See tits. "Charity," "Corporation, Municipal" (Insignia, &c.)

(f) *R. v. St. Paneras*, 5 N. & M. 222.† S. C. 3 A. & E. 535.† See also 6 A. & R. 314.† S. C. 1 N. & P. 507.† See tits. "Corporation, Municipal" (Duties, &c.)

(g) *R. v. Thetford*, 5 T. R. 364 (1 Vent. 367; 1 Mod. 79, 194, and cases there

command churchwardens of a parish, or of two united parishes, to assemble a meeting pursuant to a stat. as the 10th Ann. c. 11, for the purpose of ascertaining and agreeing as to the moneys and rates to be assessed for the repair of the church, &c. (*h*)

It has also been decided that the Court will, by mandamus, command the chapelwardens of a parish to assess a rate for the purpose of levying the proportion of a church-rate, by custom, payable by the inhabitants of the chapelry. (*i*) But where the majority at a vestry meeting held in pursuance *of a motion from the Consistory Court to take steps for [*66] repairing a church, refused to make any church-rate, and thereupon the churchwardens and the minority made a rate, the Court refused a mandamus to the chapelwardens of a township in the parish to compel them to raise their customary proportion of the rate so made. (*j*) So where a township being part of a parish is called upon by mandamus to pay a definite customary proportion of a church-rate laid for the whole parish, it must appear that the inhabitants of the township were summoned to consider the rate, for if the custom require such summons, fulfilment of that requisite is essential, and, if it do not, it is a bad custom. (*k*)

—.] *Rate, in the nature of a Church-rate.*—The writ, however, lies to command the laying and raising of a rate in the nature of a church-rate, when authorized and required by statute, &c. Thus in a case in which James I. had granted a rectory to a corporation in trust for a parish, and to pay certain stipends, and bear all charges issuing out of such rectory, and afterwards the stat. 22 & 23 Car. 2, absolved the parishioners from the payment of tithes, and enacted that a rate should be made yearly by the parish officers for the payment of stipends, and for church repairs, and by a subsequent stat. 56 Geo. 3, c. 65 (local) it was enacted, that the wardens, overseers, and inhabitants in vestry might make a rate to a large amount. It was held, on the vestry refusing to make a rate for the above purposes under the last mentioned act, that the Court had jurisdiction to issue a mandamus to command such vestry so to do, because the making of such a rate is not a matter of ecclesiastical cognizance, it being expressly required by act of Parliament. (*l*) And the Court will grant such a writ, notwithstanding the act contain a clause reserving all ecclesiastical jurisdiction, if it appear from the rest of the act that the temporal Court was

cited). R. v. St Margaret's, 4 M. & S. 250. See R. v. Coleridge, 2 B. & A. 806.† R. v. Wilson, 5 D. & R. 602. R. v. Chester (Ep.), 1 T. R. 396. R. v. St. John (Churchwardens), 16 L. J., N. S. 54, M. C.

(*h*) R. v. St. Margaret's, 4 M. & S. 249, 252; and see 5 T. R. 364. Supra, also 5 A. & E. 584.† S. C. 1 N. & P. 56.† R. v. St. Margaret's, 8 A. & E. 889. S. P. 1 P. & D. 116. See tit. "Act of Parliament."

(*i*) R. v. Thomas, 3 G. & D. 485. S. C. 3 Q. B. 589.† S. C. 11 L. J., N. S. 295, Q. B. R. v. Dalby, 3 Q. B. 602.† See tit. "Custom."

(*j*) R. v. Thomas, supra. R. v. Pickles, 3 Q. B. 599,† n. (*a*). S. C. 12 L. J., N. L. 40, Q. B.

(*k*) R. v. Dalby, 3 Q. B. 602.†

(*l*) R. v. St. Saviour's (Wardens), 1 N. & P. 496.† S. C. 3 N. & P. 126. S. C. 7 A. & E. 925,† where see form of writ, Return, &c.; and see ante, p. 22. See tit. "Act of Parliament."

intended to have at least concurrent jurisdiction; for if an act of Parliament impose a temporal duty, it is incumbent upon the Court of B. R. to enforce a performance of it,^(m) so that where such an act directs a body created by it to levy church-rates, the Court of B. R. will command it, by mandamus to levy the rate, and will not confine the writ to the ordering it to assemble for the purpose of determining whether it will levy the rate or not, as in those cases where the legal capacity to make such a rate remains as at common law.⁽ⁿ⁾

The Court will not require the making and levying of a rate which is illegal, &c. Thus, inasmuch as a rate to reimburse churchwardens, such sums as they have expended, or might thereafter expend, on the parish church, would be bad on the face of it, as in part retrospective, the [*67] *Court of B. R. will not grant a mandamus commanding them to make such rate.^(o)

—.] *Returns.*—A return to such a writ, shewing the state of the church, is good.^(p) So inasmuch as churchwardens are by law bound to supply estimates to the parishioners in vestry, of the probable amount required for a church-rate, therefore where a local act substituted a special vestry for the parishioners at large, and authorised them to make church-rates, poor-rates, and highway-rates, and the Court of B. R. had issued a mandamus to the select vestry to make a church-rate, it was held that the return of a refusal of the churchwardens to supply any estimates was a sufficient excuse for disobedience to the writ, and, therefore, a good return, as the local act contained nothing to alter the general duties of churchwardens.^(q)

—.] *Recovery of Rate.*—The writ lies to command justices, &c., to meet and examine into a complaint by one churchwarden against an inhabitant for refusing to pay a church-rate, and to hear and determine such complaint,^(r) although in a parish where there are several churchwardens, each usually acting for a separate district, for one churchwarden may legally lay a complaint, under stat. 53 Geo. 3, c. 127, s. 7, against a resident in his district for non-payment of church-rates.^(s)

So it lies to command quarter sessions to enter continuances, and hear an appeal against a church-rate.^(t)

So it lies to command justices to issue their distress warrant to enforce the payment of a church building-rate, levied in pursuance of a local act.^(u) It was, however, before the passing of the late stat. 6 & 7 Viet.

(m) R. v. St. Margaret, 1 P. & D. 116. S. C. 8 A. & E. 889.† S. C. 2 P. & D. 510. S. C. 1 W. W. & H. 673. See ante, p. 30.

(n) 8 A. & E. 899.† S. C. 1 P. & D. 116. Supra, see ante, p. 65.

(o) R. v. Haworth, 12 East, 555.

(p) 7 A. & E. 737,† note, per Lord Denman, C. J. See post, tit. "Return."

(q) R. v. St. Margaret's, 2 P. & D. 510.

(r) R. v. Wrottesley, 1 B. & Ad. 618.† R. v. Freeman, 2 Ld. Ken. 19 R. v. Lancash. (J.), 10 L. J., N. S. 103, M. C.

(s) R. v. Fenton, 1 G. & D. 17. S. C. 1 Q. B. 480.†

(t) R. v. Staffordsh. (J.), 6 N. & M. 477.† S. C. 4 A. & E. 844.† See tit. "Appeal."

(u) R. v. Buckinghamsh. (J.), 1 N. & P. 503,† and cases there cited.

c. 67, s. 3, a rule with the Court to refuse the writ in those cases where the jurisdiction of the justices was doubtful; and it has been held not to be sufficient freedom from doubt, that the rate sought to be enforced has been confirmed in the Consistorial Court, although it did not appear that such question was any longer depending,^(v) for if the validity of the rate had at any time been questioned, the Court would not interfere. But at such last-mentioned statute in terms grants an entire indemnity to those who legally execute the command of a mandamus, it is apprehended that the Court will in future be more liberal in its dispensation of the writ.

—.] *Loans, &c.; Rate for Payment.*—The writ has often been granted to command churchwardens to make and raise one or more rates, for the repayment of principal money, with interest, borrowed on the credit of the *parish and church-rates, under and conformably with the Church Building Acts, 58 Geo. 3, c. 45, and 59 Geo. 3, c. [68] 134,^(w) for the making of such a rate is authorized and required by such acts; and, therefore, although it be raised for the purpose of repairing the church, and in the nature of a church-rate, yet, in fact, as the inhabitants have assented to borrow money on the credit of the rates, the making a rate to pay a debt is not a matter of ecclesiastical cognizance, but a temporal duty.^(x)

—.] *Returns.*—The return to such a writ may consist of any facts which traverse the supposal of the writ, or which shew illegality in the security charging the rates, either by means of fraud, or by the absence or impropriety of any of the statutory requisitions, &c., or that the loan was not raised at the time the repairs were done for the laying of the rates; for the repayment, &c., should commence immediately, and be continued, so as to pay off the debt by ten annual instalments.^(y) So any special agreement with the prosecutor, if an answer to the writ may be properly the subject of a return.^(z) But it is no answer to such a writ, that the applicant may proceed at law upon a bond given as a collateral security, for that does not affect the rates.^(a)

CHURCH RATE.] See tit. *Church*.

CHURCHWARDEN.] The writ of mandamus does not lie where the place

(v) *R. v. Sillifant*, 4 A. & E. 354.† S. C. 5 N. & M. 641,† but see tit. "Quarter Sessions, Justices," and stat. 6 & 7 Vict. c. 67, s. 3, App.

(w) *R. v. Brancaster (Churchwardens)*, 2 N. & P. 580. S. C. 7 A. & E. 458,† where see form of writ, pleadings, &c. *R. v. Dursley (Churchwardens)*, 5 A. & E. 10.† S. C. 6 N. & M. 333.† *R. v. Pembroke (Churchwardens)*, 5 A. & E. 603.† S. C. 1 N. & P. 69.† And see *R. v. Brighton (Churchwardens)*, 1 N. & P. 775.† S. C. 6 A. & E. 794.† See tit. "Parish."

(x) *R. v. Lambeth (Churchwardens)*, 2 B. & Ad. 651.† And see 1 P. & D. 123, per Lord Denman, C. J. See ante, p. 66.

(y) *R. v. Dursley*, 5 A. & E. 10.† S. C. 6 N. & M. 333.† *R. v. Lambeth*, 2 B. & Ad. 651.† *R. v. Carpenter*, 6 A. & E. 794.† S. C. 1 N. & P. 775. See post, tit. "Return."

(z) See *R. v. Pembroke (Churchwardens)*, 5 A. & E. 603.† S. C. 1 N. & P. 69.†

(a) 5 A. & E. 13,† per Coleridge, J.

is one of mere service; but in the case of a temporal office, as that of churchwarden, it does, *(b)* he being both a public and a temporal officer, *(c)* his office being one of temporal trust, and concerned in the execution of justice, and whereof the common law takes notice, *(d)* for he has, amongst other things, the ordering of the goods of the church. *(e)* His office has also been enlarged by sundry acts of Parliament. *(f)*

It has, however, been held that the writ does not lie for churchwardens [**69*] **put in by order of the bishop, parson, or ecclesiastical law, but only of those elected according to the custom, &c. (g)*

This subject is arranged as follows:—

CHURCHWARDENS.				CHURCHWARDEN— <i>Lis pendens</i>			
Election	-	-	69	Non fuit electus	-	-	72
Appointment	-	-	70	Rule	-	-	73
Admission	-	-	70	Form of writ	-	-	73
Swearing in	-	-	70	Restoration	-	-	73
Returns	-	-	70	Accounts	-	-	74
Pauperism	-	-	71	Allowance	-	-	74
Labourer	-	-	71	Reimbursement	-	-	74
Incapax.	-	-	72	Inspection, &c.	-	-	74
Inhibition	-	-	72	Auditors of accounts	-	-	74

—.] *Election*.—The writ lies to command the rector and Churchwardens of a parish to convene a vestry for the purpose of electing churchwardens; *(h)* also for electing churchwardens for the remainder of the year. *(i)*

So it has been granted to command the inhabitants of a parish liable to contribute to the church-rate, to meet and assemble together with the minister, in order to elect churchwardens; *(j)* and where, to such a mandamus, the return stated an immemorial custom in the parish to have no churchwarden, and that the duties appertaining by law to the office had been from time out of mind discharged by the overseers of the poor, it was held, that inasmuch as overseers had not existed time out of mind,

(b) R. v. Raines, 3 Salk. 233, 11, 13. See post, tit. "Office."

(c) See R. v. Canterbury (Archbp.), 8 East, 218; 4 Vin. Abr. 525, pl. 4, in marg. Anon., Freem. 21. He's case, 1 Vent. 143, 267. And see Hurst's case, 1 Lev. 75, and 2 Sid. 112. R. v. Rich, Comb. 147. Bishop's case, 2 Roll. 71. Cas. t. Hard. 379.

(d) Estwick v. London (City), Sty. 42. And see Sty. 458, citing 12 Hen. 7. Leigh's case, 3 Mod. 335. R. v. White, Ld. Raym. 1379.

(e) R. v. Kingscleere, 2 Lev. 18.

(f) Anon., 1 Vent. 267. Hughs v. Needham, 3 Keb. 418. See tit. "Act of Parliament."

(g) 6 Hen. 7, 14, cited in R. v. Apleford, 2 Keb. 863. See R. v. Patrick, 2 Keb. 67. See tit. "Custom."

(h) R. v. Dr. D'Oyly and Others. R. v. Hedger, 4 P. & D. 52. S. C. 12 A. & E. 139, † contra. Anon., Stra. 686. Com. Dig. tit. "Man." (B.) R. v. Westminster, 5 A. & E. 391. † R. v. Birmingham (Rector, &c.), 7 A. & E. 254. † R. v. Wix (Inhabs.), 2 B. & Ad. 197. † Stutter v. Freston, Str. 52. See tits. "Office," (Election,) "Overseer," "Parish," "Sidesman."

(i) R. v. Lambeth, 3 N. & P. 416. S. C. 8 A. & E. 356. † S. C. 9 L. J., N. S. 113; M. C.

(j) R. v. Wix (Inhabs.), 2 B. & Ad. 197. † Sutter v. Freston, Str. 52.

and as there were necessary duties appertaining to churchwardens, and there must have been some persons bound by law to discharge those duties, the custom set out in the return was bad.(k)

So the writ will be granted where there is an election *de facto*, but which is void. So, if the election be so improperly conducted that the proceedings are merely *prima facie* void, the Court will, in order to try its validity, grant a mandamus to convene a meeting to elect, &c., because, for the office of churchwarden, *quo warranto* does not lie.(l) But in one case where, although it was stated that the doors were closed during the election, yet it did not distinctly appear that any rated inhabitant was excluded from *voting, the Court refused to grant a mandamus for a [*70] fresh election; but if such exclusion had appeared, the Court would have granted the writ, without inquiring strictly whether the number of persons excluded were, in fact, such as to affect the result of the election.(m)

So it has been granted to command parish officers to produce the rate and other books at the scrutiny of a poll which had been taken at the election of churchwardens.(n)

—.] *Appointment*.—The writ has been granted to command justices of the peace to appoint churchwardens and overseers of the poor in an extra parochial place, upon an affidavit that there was much occasion for such officers, in order that poor-rates to relieve the poor, might be made.(o)

—.] *Admission*.—The Court of B. R. is in the constant habit of granting the writ, in order to command the admission of a churchwarden to the duties of his office;(p) and if two be elected, both must be admitted, and cross mandamuses will be granted for that purpose,(q) because the office is not the subject of a *quo warranto* information.(r)

—.] *Swearing in*.—So, in like manner, the writ is constantly granted to command the swearing in of a churchwarden; for, although it has been resolved that he may execute his office before he is sworn, yet it is convenient he should be so sworn.(s) So it has been granted to swear in

(k) 2 B. & Ad. 197.† *supra*.

(l) R. v. Birmingham, 7 A. & E. 254.† R. v. Derby (Councillors), 7 A. & E. 422.† See tit. "Office," (Election). Ante, p. 27.

(m) R. v. Lambeth, 3 N. & P. 416. S. C. 8 A. & E. 356.†

(n) R. v. Fall, 1 G. & D. 118. S. C. 1 Q. B. 636.† See post, tit. "Office."

(o) Anon., P. 2 Geo. 2; 1 Barn. 155.

(p) R. v. Williams, 8 B. & C. 681.† S. C. 3 M. & R. 402; see form of writ. R. v. Middlesex (Archdeacon, &c.), 5 N. & M. 494.† Anon., 2 Chit. 254.† Trem. Pl. Cor. 469, where see form of writ.

(q) R. v. Harris, Burr. 1420. S. C. W. Blac. 430, where see form of writ. Com. Dig. tit. "Man." (D. 4). See *infra*. "Swearing in," and tit. "Office," (Admission).

(r) See ante, p. 26, 29.

(s) 3 Bl. Com. 111. Northampton's case, Carth. 118. R. v. Rees, Carth. 393. S. C. 5 Mod. 325. S. C. Comb. 417. S. C. 12 Mod. 116. R. v. Henchman, Cas. t. Hard. 130. Carpenter's case, Raym. 439, where see direction of writ, and see return. Anon., 1 Vent. 115. R. v. Dr. Harris, 1 W. Blac. 429. S. C. Burr. 1420, where see form of writ. Patrick's case, Raym. 111. Anon., Freem. 366. R. v. Twitty, 7 Mod. 83. S. C. 2 Salk. 433. S. C. Holt, 442. Love v. Dr. Bently, 11 Mod. 134. Stoughton v. Reynolds, Cas. t. Hard. 274. S. C. Fort. 168. S. C. Stra. 1045. Hubbard v. Penrice, Stra. 1246. R. v. Harwood, 8 Mod. 380. S. C. Ld. Raym. 1405; the authority of the report of this case in 8 Mod. is impugned, and that in Ld. Raym. 1405 upheld;

[*71] a second *churchwarden,(t) whether chosen by the parishioners,(u) either by an election according to custom,(v) or by the parishioners, who of common right may make the election.(w)

The writ for this purpose will be granted against a bishop, his deputy, an archdeacon, or other competent judge in that behalf, whose duty it is to swear in, &c. ;(x) and this, although there be another churchwarden peaceably in possession of the office, for such second churchwarden is not otherwise enabled to try his right to the office,(y) it not being the subject of *quo warranto* (z).

The duty of swearing in, is ministerial merely.(a)

—.] *Return, Pauperism, Labourer, &c.*—It is because the duty of swearing in a churchwarden is ministerial merely, that no excuse for the nonperformance of it, can be the subject of a valid return to a writ commanding it. Thus, a return that the prosecutor was a “pauper lactarius (a poor dairyman) et servus et minus habilis et idoneus ad exequendum officium prædictum,” has been held to be bad. So a return that the prosecutor is “servus,” has been held not to be good, upon the principle that the person whose duty it is to swear in, is, for that purpose, a ministerial officer merely, and cannot refuse to exercise his office,(b) nor inquire

see *R. v. Williams*, 3 M. & R. 405, per Bayley, J. *R. v. Chester (City)*, 5 Mod 11; Fitz. 195; *Ld. Raym.* 1495. *Parish of St. Balaunce's case*, Palm. 50; the report says, “a special writ was prayed,—it is however clear, that such writ was a mandamus, as it contained the alterative clause, ‘vel eoram nobis significet quare non,’ &c.,” ante, p. 6. *R. v. Rice*, 5 Mod. 325, and cases there cited. S. C. 12 Mod. 116. S. C. 3 Salk. 90. S. C. Comb. 417. S. C. Certh. 393. S. C. *Ld. Raym.* 138. *Leigh's case*, 3 Mod. 335; *Burr.* 1421. S. C. 1 W. Blac. 430. *R. v. Simpson*, 8 Mod. 325. S. C. *Stra.* 609. *R. v. White*, *Ld. Raym.* 1379; *March*, 101. *R. v. Oxenden*, 1 Show. 219. *R. v. White*, 8 Mod. 325. *R. v. Ward*, 1 Barn. 381. *Morgan v. Cardigan (Archdeacon)*, 1 Salk. 166. S. C. *Ld. Raym.* 138. *Anon.*, 2 Chit. 254.† *Ex parte Lowe*, 4 D. 15. *R. v. Chester (Archdeacon)*, 1 A. & E. 342.† S. C. 3 N. & M. 413. *Ex parte Wingfield*, 3 A. & E. 614.† *R. v. Middlesex*, 3 A. & E. 615.† S. C. 5 N. & M. 494.† *Ex parte Duffield*, 3 A. & E. 617.† See *Campbell v. Maund*, 5 A. & E. 876.† *R. v. Litchfield (Archdeacon)*, 5 N. & M. 42.† *Trem. pl. Cor.* 469, where see form of writ. *Bac. Abr.* tit. “Man.” (U). See tits. “Chapelwardens,” “Sidesman.”

(t) *Dr. King's case*, 1 Keb. 517, citing *Warner's case*, 15 Car. 1, *Rot.* 44. S. C. 1 Keb. 521. See tit. “Office” (Swearing in).

(u) *R. v. Patrick*, 2 Keb. 66, citing *Sutton Vallance's case*, T. 17 Jac., *March*, 15 Car. 1, and *II.* 17 Car. 1, there cited. See also 2 *Lut.* 1010, where see the suggestion, writ, and traverse.

(v) *Polhill v. Blany*, 2 Keb. 753. *R. v. Guy*, 6 Mod. 89, and cases there cited. *The Bishop's case*, 2 Roll. 106, 107. *Evelin's case*, *Cro. Car.* 551, 589. S. C. *Jones*, 439. S. C. 2 Roll. *Abr.* 234. And see *R. v. Rushworth, W. Kely.* 287. S. C. 7 Mod. 217; *March*, 22, 66; *Noy*, 31. *Catten v. Barwick, Stra.* 145. *Hubbard v. Penrice*, *Stra.* 1246. *Anon.*, 1 Vent. 267. *Hughs v. Needham*, 3 Keb. 418. *Per Glyn, C. J.*, in 2 *Sid.* 112.

(w) *Morgan v. Cardigan*, 1 Salk. 166. S. C. *Ld. Raym.* 138; *Noy*, 139. *Ward v. Brampston*, 3 Lev. 362. *Dawson v. Fowle*, *Hard.* 378.

(x) *R. v. Winchester*, 7 East, 573. *R. v. Dr. Harris*, 1 W. Blac. 429. S. C. *Burr.* 1420. *R. v. Williams*, 3 M. & R. 402. *Hughs v. Needham*, 3 Keb. 418.

(y) See *Dr. King's case*, 1 Keb. 517. S. C. 1 Keb. 521. See supra, “Admission.”

(z) See tit. “Office” (Election), ante, p. 69.

(a) *R. v. Rees*, 12 Mod. 116. S. C. *Ld. Raym.* 138. *R. v. Williams*, 8 B. & C. 681.† S. C. 3 M. & R. 404. *R. v. White*, *Ld. Raym.* 1379, cited and approved upon this point in *R. v. Simpson*, *Stra.* 609, 894. *R. v. Harris*, *Burr.* 1420. S. C. 1 W. Blac. 430.

(b) 12 Mod. 116. S. C. 3 Salk. 90. S. C. 5 Mod. 325. S. C. Comb. 417. S. C.

*into the ability, &c., of the party elected; nor return that such party is incompetent to act; nor try the validity of the votes; for, it is [*72] argued, why should such ministerial officer be judge, rather than those who are most concerned in interest, namely the parishioners? and it is not to be presumed, that the ordinary, archdeacon, &c., will take more care to put a fit and able person into this office, than they who have the power to choose, and are answerable for, him.(c)

——.] ——. *Inhibition*.—So a return by an archdeacon, that before the coming of the writ, he received an inhibition from the bishop, with a signification that he had taken upon himself to act in the premises, is bad.(d)

——.] ——. *Lis pendens* is not a good return to such a writ. Thus, where the Ecclesiastical Judge returned cross causes, depending before himself, contesting the right of election, and that he could not admit and swear them until it should have been judicially determined that they were duly elected; such return was adjudged bad, on the ground that both writs ought to have been obeyed, for such a course would not prejudice the right of either claimant.(e)

——.] *Non fuit electus*.—So to such a mandamus to swear in, &c., it would seem that formerly a return of quod non fuit electus generally, because the ordinary could not judge of the election, was bad.(f) But it has since been held, that if the writ contain the usual suggestion that the prosecutors were duly elected, &c., the officer may, at the peril of an action, return, that the prosecutor was not duly elected, and thus raise the question in an action for a false return,(g) and such a return cannot

Carth. 393. S. C. Ld. Raym. 138. S. C. 1 Salk. 165, 5, 166. Bac. Abr. tit. "Man." (C). Assuming, for the sake of argument, the ordinary to be the judge of the fitness of him elected churchwarden, yet the returns above stated would, it is apprehended, be insufficient in substance, for pauperism is no ground of disqualification: thus the Roman Law, Inst. 1, 26, s. 3, "suspectum enim eum putamus, qui moribus talis est, ut suspectus sit: enimvero tutor vel curator, quamvis pauper sit, fidelis tamen et diligens, removendus non est quasi suspectus." The same rule obtains in equity, a trustee not being removable simply on account of poverty. See tits. "Administration," "Will."

(c) R. v. Rice, 5 Mod. 326. S. C. 1 Salk. 166, and cases there cited. R. v. Dr. Henchman, Cas. t. Hard. 130, n. (a); Burr. 1423. S. C. 1 W. Blac. 430. The strictness of the doctrine, as stated in the text, would seem by subsequent cases to have been somewhat relaxed; see infra, "Non fuit electus."

(d) R. v. Simpson, Stra. 609. S. C. 8 Mod. 325. S. C. Ld. Raym. 1379. R. v. Dr. Henchman, Cas. t. Hard. 130, n. (i). See also Stra. 640. R. v. Dr. Ward, 1 Barnard, 381. Com. Dig. tit. "Man." (D. 4.) See tits. "Inhibition," "Registrar," (Return).

(e) See ante, p. 23. R. v. Harris, Burr. 1421. S. C. 1 W. Blac. 430. R. v. Reynell, T. 8 & 9 Geo. 2; Cas. t. Hard. 130, n. (1). Carpenter's case, Raym. 439. R. v. Middlesex, 5 N. & M. 494;† F. g. 195; Ray. 440. Com. Dig. tit. "Man." D. 4. See tits. "Administration" (Return, *Lis pendens*), "Office," (Election), "Will," (Return, *Lis pendens*).

(f) Com. Dig. tit. "Man." D. 3, 4. R. v. White, Ld. Raym. 1379. S. C. 8 Mod. 325. R. v. Williams, 8 B. & C. 681;† R. v. Harris, Burr. 1420. See Stra. 894, 895.

(g) R. v. Williams, 3 M. & R. 402. S. C. 8 B. & C. 681;† R. v. White, Ld. Raym. 1379. S. C. 8 Mod. 380, 325, n. (a). R. v. Harwood, Ld. Raym. 1405. Anthony v. Leger, 1 Hagg. 10, cited in R. v. Middlesex, 5 N. & M. 494,† n. (a), c. Com. Dig. tit. "Man." D. 4. See tits. "Return" (Traverse), "False Return," (Traverse.) Cas.

be quashed for insufficiency.(*h*) For it seems that where the ordinary knows that the party applying to be sworn, &c. has no legal title to the office, it is *less objectionable to return non debito modo electus, [*73] than to administer an oath under circumstances which render it idle and inoperative.(*i*) In fact, such a return may now be considered to be good.

As to the form of the traverse; if the writ be to admit two churchwardens "debito modo electi," the return will be sufficient if it say, "non fuerunt debito modo electi," for both must have been so elected, or the writ is insufficient.(*j*) So, if the writ be generally "to swear those that are chosen," a general return that "they were not chosen," is good. So, if the writ set forth specially that they were chosen "debito modo," a return that they were not chosen "debito modo," is good; but such a return to a general writ has been held to be bad,(*k*) for a return of "not duly elected" cannot be made to a writ which merely states that "they were elected."(*l*) But if the writ recite that "they have been duly elected," then, as before stated, such a return is good.(*m*)

——. *Rule.*—The rule for a mandamus to swear in a churchwarden is absolute in the first instance, where there is no rival candidate (though others claim to have been elected,) and no reason is assigned for the refusal to administer the oath, because a mandamus to swear in merely, does not confer any title.(*n*) But the applicant should be prepared with an affidavit of his due election, demand, and refusal, and of notice to the defendant of the application to the Court; the ground of refusal need not, however, appear by the affidavit in support of the rule.(*o*)

——. *Form of writ.*—The same writ may command the admission of two churchwardens.(*p*)

t. Hard. 130, n. (1). R. v. Cornwall (Corp.), 11 Mod. 174, n. (*e*). R. v. Lambert, 12 Mod. 3. Austin v. Gervas, 2 Barn. 242. R. v. Twitty, 2 Salk. 434. Fitz. 195. Stra. 895. S. C. 1 Barn. 412.

(*h*) 3 M. & R. 402. S. C. 8 B. & C. 681,† supra. See ante, p. 6, and post, tit. "False Return."

(*i*) R. v. Middlesex, 5 N. & M. 497,† n. (*a*). Cas. t. Hard. 130, n. (1); Ld. Raym. 1405, and also 1379. See ante, n. (*g*).

(*j*) R. v. Twitty, 2 Salk. 434. S. C. 7 Mod. 83. S. C. Holt, 442. Com. Dig. tit. "Man," D. 3. R. v. Chester (City), 5 Mod. 11; Fitzg. 195, Ld. Raym. 1495. R. v. Lyme Regis (Mayor), Doug. 79, 80. Hubbard v. Penrice, Stra. 1245; but see R. v. Guise, 3 Salk. 88. S. C. Ld. Raym. 1008. S. C. 6 Mod. 89. See tit. "Return," "Traverse," post.

(*k*) See n. (*j*), supra. R. v. Guy, 6 Mod. 89. S. C. Ld. Raym. 138, 559, 1008, Com. Dig. tit. "Man," (D.)

(*l*) R. v. Guy, 6 Mod. 89. S. C. 3 Salk. 88. S. C. Ld. Raym. 1008. R. v. Twitty, 7 Mod. 83. S. C. 2 Salk. 434. R. v. Taunton, Cowp. 413. R. v. Henchman, Cas. t. Hard. 130. Com. Dig. tit. "Man," (A.) See post, tit. "Return."

(*m*) R. v. Williams, 8 B. & C. 681, 682, 683,† S. C. 3 M. & R. 402. R. v. Twitty, 2 Salk. 434. See post, tits. "Return," "Plea," "Traverse."

(*n*) R. v. Litchfield, 5 N. & M. 42,† S. C. 1 H. & W. 463; Anon., 2 Chit. 254,† Ex parte Lowe, 4 D. 15, and n. (*a*). Ex parte Winfield, 3 A. & E. 614,† Ex parte Duffield, 3 A. & E. 617,† Anon. 2 Chit. 254,† Ex parte Penruddock, 1 H. & W. 347. See tit. Ind. "Effect of Mandamus."

(*o*) 3 A. & E. 614,† 3 A. & E. 618,† supra. See tit. "Application" (Notice), (Demand and Refusal.)

(*p*) R. v. Twitty, 2 Salk. 434. See Ind. tit. "Mandamus" (Mandatory Clause).

—.] *Restoration*.—The writ will also be granted to restore a churchwarden who had been improperly removed from his office.(g)

—.] **Accounts, Allowance*.—It lies to command justices to examine and allow churchwardens' accounts, in pursuance of stat. [*74] 50 Geo. 3, c. 69, s. 1.(r)

—.] *Reimbursement*.—Inasmuch as a rate to reimburse churchwardens such sums as they had expended, or might thereafter expend, on the parish church, would be bad on the face of it, as in part retrospective, therefore the Court of B. R. will not grant a mandamus to make such rate.(s)

—.] *Accounts, Inspection, &c.*—It lies to command churchwardens to allow an inspection of their accounts, under stat. 17 Geo. 2, c. 38, s. 1, but the applicant must state and show some public ground for desiring such inspection; and this, notwithstanding sect. 14 of the act, imposes a penalty upon churchwardens wrongfully refusing an inspection.(t) So it lies to command quarter sessions to hear and determine a complaint against ex-churchwardens for not signing, passing, and delivering their accounts, pursuant to stat. 17 Geo. 2, c. 38. But the defendants may show that they have, in fact, signed, &c., their accounts.(u)

—.] *Auditors of Accounts*.—So it will be granted to command churchwardens to assemble the parishioners in the manner required by their parish act, in order to elect auditors of their accounts.(v)

CITIZEN.] *Admission*.—By stat. 12 Geo. 3, c. 21, s. 1,(w) it is enacted, that where any person entitled to be admitted a citizen, &c., of any city, &c., shall apply to the mayor, &c., to be admitted, and the mayor, &c., shall not admit him within one month after notice, a mandamus shall issue to compel him so to do, and he shall pay all costs. See, however, the important provisions of the subsequent statute of 6 & 7 Vict. c. 89(x) on this subject.

—.] *Restoration*.—It lies also to restore a citizen to his franchise

(g) The Protector and Craford, Sty. 457, per Glyn, C. J.; and see R. v. Patrick, 1 Keb. 610. S. C. 2 Keb. 66. Evelin's case, 1 Cr. 397; 2 Inst. 623; 2 Sid. 112; Vent. 143; 3 Mod. 335; 5 Mod. 325; Bac. Abr. tit. "Man," C. See tit. "Office" (Restoration).

(r) R. v. Cambridge (J.), 8 D. 89. See tits. "Act of Parliament," "Highway" (Surveyors' Accounts), "Overseers."

(s) R. v. Haworth, 12 East. 555. See *ante*, tit. "Church" (Rate).

(t) R. v. Clear, 7 D. & R. 393.† S. C. 4 B. & C. 899.† R. v. Clapham, 1 Wils. 305. R. v. Bletshow, 1 Bott. 300. Com. Dig. tit. "Man." (D.) See tits. "Act of Parliament," "County" (Accounts).

(u) R. v. Worcestersh. (J.), 3 D. & R. 299.† See R. v. Carrooke, 1 Bott. P. L. 299; Show. 295.

(v) R. v. St. Paneras, 1 A. & E. 80.† See tits. "Act of Parliament." "Parish."

(w) See stat. App.

(x) See stat. App. R. v. Ld. Montacute, 1 W. Blac. 64. S. C. 1 Wils. 283. See tits. "Franchise," "Freedom," "Freeman," "Office," (Election); and see stat. 6 & 7 Vict. c. 89, App.

if he be improperly deprived.(y) Thus, if he be disfranchised for refusing to stand to the award of two aldermen as to an action.(z)

——.] *Capital; Restoration*.—So it lies to restore to the office of capital citizen.(a)

[*75] *CITY.] See tits. *Borough; Corporation (Municipal); Franchise; Freedom; Freeman*.

CITY WORKS, CLERK OF.]—It lies for the office of clerk or surveyor of the city of London works.(b)

——.] *Restoration*.—It lies also to restore to such office, it being one for life, with fees and profits, also an ancient office, and one of public benefit, the sworn duty being to survey and view the walls and gates of the city, and to employ men in repairing the breaches and defects as often as they shall happen, and to cleanse the fountain heads, and to have the custody of the keys of all the conduits. He is also sworn in to duly execute his office by a particular oath, and he also takes the oath to government.(c)

CLERK OF BUTCHERS' COMPANY.] See tit. *Butchers' Company*.

CLERK OF CITY WORKS.] See tit. *City Works, (Clerk of)*.

CLERK OF THE CROWN.] See tit. *Secondary of Clerk of the Crown*.

CLERK OF CUSTOS BREVIUM.] See tit. *Custos Brevium*.

CLERK OF DEAN AND CHAPTER.] See tit. *Dean and Chapter*.

CLERK OF THE FINES IN THE MARCHES OF WALES.] See tit. *Marches, &c.*

CLERK OF GUARDIANS OF POOR.] See tit. *Guardians of Poor*.

(y) Middleton's case, 3 Dyer, 332 b. 333, pl. 28. Although it would appear from this report that the case was moved in the C. B., yet the writ was awarded from the Court of B. R., per Dodderidge, J., 3 Dyer, 332 n. Bagg's case, 11 Rep. 93. S. C. 1 Roll. 173, 224. Philips v. Bury, 4 Mod. 122. S. C. 2 T. R. 355.

(z) Middleton's case, 3 Dyer, 332 b. 333, pl. 28, and cases there cited.

(a) R. v. Carlisle (Mayor), Fort. 200.

(b) R. v. Lee, 1 Show. 252, citing Cock's case, 2 Sid. 112 (which book, per Dolbin, J., "is fit to be burned, being taken by him when a student, and unworthily done by them that printed it:" per Somers, S. G.) See Middleton's case, 1 Sid. 169; 5 Com. Dig., 8vo. edit. 21.

(c) Le Case del Clark de City Works de Londres, 2 Sid. 112. This point was not, however, determined in this case, for the Court not being fully advised as to the nature of the office, left the case to be moved again; but see R. v. London (Mayor), 3 T. R. 182, n.(b), cited also in Mr. Leigh's case, 3 Mod. 334, n. (y) See R. v. London (Aldermen), 2 Barn. 398; Bac. Abr. tit. "Man." C., as to the further duties of the office.

CLERK OF JUSTICES.] See tit. *Justices (Clerk)*.

CLERK OF LAND TAX COMMISSIONERS.] See tit. *Land Tax Commissioners*.

CLERK OF MASONS' COMPANY.] See tits. *Masons' Company*; *Company (Clerk)*.

CLERK OF PARISH.] See tit. *Parish Clerk*.

*CLERK OF PEACE.] See tit. *Peace (Clerk of)*. [76]

CLERK OF PRIVATE COMPANIES.] See tit. *Company (Clerk)*.

CLERK OF TURNPIKE TRUSTEES.] See tit. *Highway (Clerk)*.

CLERK OF VESTRY.] See tit. *Vestry Clerk*.

CLERK OF VILL.] See tit. *Vill*.

CLERK OF THE WATERS, LONDON.] See tit. *Mint*.

CLOTHMAKERS' COMPANY.] See tits. *Company*; *Freedom (Company)*.

COLCHESTER CORPORATION COURT OF.] See tits. *Attorney*; *Courts Inferior*.

COLCHESTER, HIGH STEWARD OF.] *Swearing in*.—It lies to command the swearing in of the high steward of Colchester, for he is a public officer.(d)

COLLEGE.] This subject is arranged as follows:—

COLLEGE	COLLEGE
Chaplain - - - - 76	Swearing in - - - 79
Fellows - - - - 77	Restoration - - - 79
Election - - - - 77	Member - - - - 79
Admission - - - - 77	Admission - - - 79
Expulsion - - - - 77	Oaths - - - - 80
Appeal - - - - 78	President - - - - 80
Restoration - - - - 78	Provost - - - - 80
Librarian - - - - 79	Scholarship - - - 80
Admission - - - - 79	Seal - - - - 80
Master - - - - 79	Vice Master - - - 80
Appointment - - - 79	Visitor - - - - 80
Election, &c., or - - - 79	Jurisdiction of - - - 80
Admission - - - - 79	Deprivation - - - 81

(d) Anon., M. 1652; Sty. 355. See tits. "Stratford-upon-Avon Steward," "Steward."

A college is a civil corporation, of which, if no visitor be specially appointed, the founder, and his heirs are clothed with that office.

—.] *Chaplain.*—The writ does not lie, either to command the admission or restoration of a College chaplain, because he is under the dominion of the visitor,^(e) to whom an appeal must be made.

[*77] —.] **Fellows, Election.*—The Court has both granted^(f) and refused the writ of mandamus to command the visitor to determine the disputed election of a fellow.^(g)

—.] *Fellows' Admission.*—The Court of B. R. will, it seems, grant a mandamus to admit to a fellowship of a College, and has often done so.^(h) Thus the stat. 1 Geo. 1, s. 2, c. 13, concerning the abjuration oaths, orders visitors to admit others in the room of nonjuring fellows, and on a refusal to admit, the Court will, in such a case, grant the writ,⁽ⁱ⁾ and therefore the Court requires the fact and jurisdiction of the visitor, if any, to be shewn on the return, and will not supersede such a writ on motion and affidavits;^(j) but if by the return it appear there is a visitor, the Court will not grant a peremptory mandamus; although formerly in the case of colleges that were of royal foundation, and no visitor was appointed, the Court granted the writ; but in the case of private foundations, it was always doubted whether the writ could be awarded, admitting that no visitor was appointed by the statutes.^(k) And the peremptory writ will be denied where a visitor is returned, although such return does not show that there was a visitor at the time of refusal to admit, &c., or that his authority extended to admit or refuse admission to fellows.^(l)

—.] *Fellows, Expulsion.*—Although there is a judgment of Lord Hale,^(m) in which he states, that the writ of mandamus is the legal instrument whereby to remove fellows from their fellowships, by virtue of the original jurisdiction and authority which the Court of B. R. has, to enforce the execution of the laws, and for the preservation of good government; yet inasmuch as we shall see,⁽ⁿ⁾ that the Court has no juris-

(e) R. v. Chester (Ep.), Stra. 797. Prohurst's case, Carth. 168; Andr. 177; Bac. Abr. tit. "Man." C. 2. R. v. St. Catherine Hall, 4 T. R. 233. See tits. "Chaplain," "Office" (Restoration Return), "Visitor."

(f) R. v. Blythe, Mod. 404; but this case was never decided, 5 Mod. 423, n. (a). S. C. 5 Mod. 421.

(g) R. v. Patrick, 2 Keb. 166, per Windham, J., where it is stated that there were no precedents for such a writ.

(h) Trem. Pl. Cor. 483, where see form of writ. Woolverton's case, P. 2 Edw. 2, memb—, cited in R. v. Patrick, 2 Keb. 172. Bentley v. Ely (Ep.), 1 Barn. 453. R. v. St. Peter's Coll. 9 L. J., N. S. 321, Q. B.

(i) R. v. Ely (Ep.), 1 W. Blac. 52; 1 Wils. 266, S. C., and see the stat. App.

(j) R. v. Whaley, T. 13 Geo. 2; Stra. 1139. S. C. 7 Mod. 308, also cited in 7 Mod. 356, n. (f); 2 Keb. 863. See post, Dr. Patrick's case, 1 Lev. 65. See tits. "College," (Visitor), infra, "Visitor."

(k) R. v. All Soul's Coll., Sir T. Jon. 175, and cases there cited. Anon., 2 Barn. 437. Dr. Bentley v. Ely (Ep.), 1 Barn. 453, per Page, J. Bac. Abr. tit. "Man." C. 2.

(l) R. v. Allsop, 2 Show. 117. S. C. 2 Jones, 174. Dr. Robert's case, per Dolben, J., 2 Show. 170. R. v. Canterbury, (Archbp.), 7 Mod. 220. See "Visitor," infra.

(m) Comb. 280. See tits. "Office," (Removal), "University."

(n) Infra, p. 78.

fiction to restore a fellow upon undue expulsion, it seems that no sound reason can be given why it should be allowed, to expel one not duly admitted, or unduly continued after a good admission; indeed, the later authorities seem clearly to have decided, that the Court of B. R. has no such jurisdiction.(o)

*But the writ will be granted to command the Vice-Chancellor, [*78] or other proper functionary, to receive, hear and determine an *appeal*, upon the expulsion of a fellow.(p)

—.] *Fellow, Restoration.*—Many of the older cases shew, that the Court of B. R. has often granted the writ of mandamus to fellows of colleges for various purposes, and the books furnish many dicta that they, quâ fellows, had a locus standi as applicants for the writ.(q) Thus, the Court often assumed and exercised the jurisdiction of commanding, by writ of mandamus, the restoration of a fellow unlawfully deprived, notwithstanding the existence of a visitor, and this so early as the reigns of Edw. 2, and Edw. 3.(r) But the Judges, at an early period, began to doubt the correctness of those cases, which affirmed this jurisdiction,(s) and ultimately overruled them.(t) So that it is now clearly established, that the writ does not lie to restore a fellow to his fellowship in those cases where there is a visitor who has jurisdiction, and to whom an appeal can be made, and before whom, and no one else, the matter is examinable; for when a man accepts a fellowship, he does so subject to the rules of the college, and the private laws of the founder; colleges being corporations, or foundations which, like Inns of Court,(u) in no way concern the public, and as they are governed by the particualar laws of the founders, the Court of B. R. cannot notice their private ordinance, nor grant the writ for the purpose of, in any way interfering.(v)

(o) R. v. St. John's Coll., Comb. 279. S. C. Holt, 436. S. C. 4 Mod. 233, 236. S. C. Skin. 359, 368, 393, 454, 546. R. v. Dr. Gower, 3 Salk. 230, 7; Andr. 183; Com. Dig. tit. "Man." (B.); Bac. Abr. tit. "Man." (D.)

(p) Usher's case, 5 Mod. 452. R. v. Ely, (Ep.), 1 Blac. Rep. 58. S. C. 1 Wils. 266. See tits. "Courts Inferior," "Visitor."

(q) Per Glyn, C. J., in City Works case, 2 Sid. 112. The Protector v. Craford, Styles, 457; 50 Edw. 3, p. 2, memb. 8. Woolverton's case, cited in Patrick's case, Raym. 110; 1 Keb. 834; 26 Edw. 3, per Hale, C. J.; 2 Keb. 799, and 1 Mod. 82. Anon., Freem. 21, per Hale. R. v. Blythe, 5 Mod. 404, per Rokeby, J.; F. Corody, 6; the very sending the writ shews a right to the jurisdiction till the contrary be shewn; 21 Edw. 1, C. B. Rot. 318; March. 181; Patrick's case, Raym. 110, 111. Dr. Lewes's case, also there cited; Trem. Pl. Cor. 478, where see form of writ; Bac. Abr. tit. "Man." C. 2.

(r) See previous note, and Dr. Witherington's case, E. T., 13 Car. 2; 1 Lev. 23. S. C. 1 Keb. 2. Patrick's case, Raym. 110.

(s) Appleford's case, 1 Mod. 82; Raym. 31.

(t) 3 Mod. 265; 1 Lev. 23; Carth. 92; Com. Dig. tit. "Man." (A.) (B.)

(u) R. v. Gray's Inn, Doug. 353.

(v) Parkinson's case, Comb. 143. S. C. Holt, 143. See Appleford's case, supra. who was not restored, because it appeared upon the return that he was properly expelled, and 1 Sid. 71, Dr. Widdrington's case, both there cited. Dolben, J., Comb. 143, said that the writs in Widdrington's and Goddard's case were both obtained by surprise, although Ld. Holt's MS. of those cases does not so express it; and the Court was so clear that it had no jurisdiction that it would not put the college to make a return. See 2 Keb. 863, Widdrington's case, Raym. 31; Comb. 143, 441.

[*79] *Neither will the writ be granted for the profit or privileges of a fellowship only, if the prosecutor be not removed from his place; (w) because he has a remedy by action. (x)

—.] *Librarian, Admission.*—The writ will be granted to command the admission of a college librarian, appointed by the person in whom such power is vested by the college statutes. (y)

—.] *Master.*—So the writ lies for a master of a college, if there be no visitor. (z)

—.] *Appointment.*—So it has been granted to command the appointment of one of several persons nominated to the mastership of a college, where the duty of appointing is ministerial merely, and not visitatorial. (a)

—.] *Election or Admission.*—But it has been held that a mandamus does not go to elect or admit to such an office, the remedy being by appeal to the visitor, and also because such master may have an action on the case, for not admitting him. (b)

—.] *Swearing in.*—It has, however, been held, that the writ lies to command the swearing in of one elected master of a college, but there did not appear to be a visitor for the purposes of the master, and the rule was made absolute, no cause being shown. (c)

—.] *Restoration.*—A mandamus does not lie to a college where there is a visitor; so that it lies not in such a case to restore to the mastership of a college; (d) for if the master of a college be wrongly ousted,

S. C. Carth. 92 (and Ailoff's and Dr. Robert's case there cited). S. C. 1 Show. 74, and 74. n. (b) (c). S. C. 3 Mod. 265. S. C. Holt, 143. Philips v. Bury, 454. S. C. 4 Mod. 112, 124. S. C. 2 T. R. 346. R. v. St. John's Coll., 4 Mod. 236; Andr. 177. See St. John's Coll. v. Toddington, Burr. 195. S. C. 1 W. Blac. 71. R. v. Dr. Windham, Comp. 378. R. v. Chester (Ep.), 1 W. Blac. 22. Brideoak's case cited in 1 W. Blac. 25. R. v. Ely (Ep.), 2 T. R. 290. R. v. Catherine Hall, &c., 4 T. R. 233, 241, et notis. R. v. Alsop, 2 Show. 170. See also Dr. Goddard's case, 1 Lev. 19. S. C. 1 Sid. 29. S. C. 1 Keb. 75, 84. Dr. Robert's case, 2 Keb. 102, 864; and Dr. Merrit's case, where like writs to the College of Physicians were denied. Widdrington's case, Ray. 31, 68. S. C. 1 Sid. 71. S. C. 1 Lev. 23. S. C. 1 Keb. 2, 50, 61, 79, 131, 150, 234, 458; Jones, 174, 175, accord., per Wyndham, J., in R. v. New Water Works, 1 Lev. 123; and see Patrick's case, 1 Lev. 65. S. C. Raym. 101. S. C. 2 Keb. 65. See R. v. Raines, 3 Salk. 233, 11, 14. Clare's case, 1 Keb. 14. Kenn's case, Co. 7, 44; 13 Ass. 2; 8 Ass. 8 Edw. 3. R. v. New Coll., 2 Lev. 14. S. C. 1 Mod. 82, nom. Apleford's case. S. C. 2 Keb. 799, 861; Raym. 112; Com. Dig. tit. "Man." (A.) (B.)

(w) Dr. Goddard's case, 1 Keb. 75, 84, per Twisden, J., which was recognised in R. v. Middleton, 1 Keb. 625. See tit. "Office-Suspension."

(x) *Ante*, p. 18, 20.

(y) Canterbury (Archbp.) v. Trinity Coll., 1 Barn. 194.

(z) Patrick's case, Ray. 101, and cases there cited. Com. Dig. tit. "Man." (A.) See tit. "School," "Visitor."

(a) R. v. Ely (Ep.), 2 T. R. 290. See Philips v. Bury, 2 T. R. 346. But see tit. "Office," "Visitor."

(b) Patrick's case, 2 Keb. 167, per Twisden, J. See tit. "Visitor." *Ante*, p. 20.

(c) R. v. Chester (Ep.), 1 Barn. 52. See Patrick's case, 2 Keb. 167, per Twisden, J.

(d) Dr. Patrick's case, 1 Lev. 65. S. C. Raym. 101. S. C. 1 Sid. 346. S. C. 1 Keb. 289 (where it is said Dr. Widdrington's case should not have been granted), 294, 298, 551, 610, 665. S. C. 2 Keb. 167, per Twisden, J. Dr. Widdrington's case, 1 Lev. 23. R. v. New Coll., 2 Lev. 14. See tit. "Visitor."

an assize will lie; but not if he be ousted by his proper ordinary or visitor.(c)

—.] *Member, Admission*.—So a mandamus will not lie to command the heads of a college to admit a member, unless he have an inchoate right to be entered.(f)

—.] **Oaths*.—The Court has granted the writ to command [*80] the master of the college to take the oaths of the fellows, as prescribed by stat. 1 W. & M. c. 8.(g) As to granting the writ, on a refusal to take the oaths, pursuant to stat. 1 Geo. 1, c. 2, s. 13; see that stat. *Appendix*.

—.] *President*.—It does not lie to command the senior fellow of a college to be president thereof, if there be a visitor.(h)

—.] *Provost*.—See titles *Eton College*; *Prebendary*; *Provost of College*.

—.] *Scholarship*.—It lies to command the president of a college to admit a person chosen to a scholarship; for such person being but a nominee, and therefore not on the foundation, is not until admission, under the jurisdiction of the visitor.(i) But if it be doubtful whether the visitor have power to refuse, the Court will grant the writ and order the statutes to be returned.(j)

—.] *Seal*.—The writ lies to command the provost of a college to affix the college seal to a presentation by the college, it being a purely ministerial act.(k) So it has been granted to command the warden of a college to affix the common seal of the college to an answer of the fellows, &c., in Chancery, contrary to his own separate answer put in.(l)

—.] *Vice Master*.—A mandamus to deprive the Vice Master, as general visitor of a college, has been refused.(m)

(c) Canon's case, Dyer. Dr. Widdrington's case, 1 Lev. 23. The writ of assize is an obsolete remedy, see *ante*, p. 19.

(f) R. v. Lincoln's Inn, 7 D. & R. 368,† per Littledale, J. See tits. "Inn of Court," (Admission), "Scholarship," "University" (Member, Scholar). *Ante*, pp. 27, 28.

(g) R. v. St. John's Coll., 4 Mod. 233, &c., *supra*. See tit. "College" (Master). See tit. "Office" (Restoration, Return, Oaths).

(h) R. v. St. Catharine Hall, 4 T. R. 235. Patrick's case, Raym. 101. S. C. 1 Lev. 65. S. C. 2 Keb. 65, &c. Trem. Pl. Cor. 472, where see form of writ. See tit. "Visitor."

(i) R. v. St. John's Coll. &c., 4 Mod. 260. S. C. 4 Mod. 368, 369, n. (b). S. C. Comb. 238. S. C. Holt, 436, 437; 2 T. R. 290, 6; Com. Dig. tit. "Visitor," (A. 15), *et seq.* See *supra*, "Member," (Admission), and post, tit. "Visitor."

(j) Note (i), *supra*. See tit. "College," (Visitor), *infra*.

(k) R. v. Dr. Bland, 7 Mod. 355, Lee, C. J., saying, he saw no difference between this and the Salisbury (Ep.) case. R. v. Barker, Burr. 1265. S. C. 1 W. Blac. 352. See R. v. Cambridge (U.), Burr. 1663, per Ashton, J. R. v. Cambridge (U.), 1 W. Blac. 547. S. C. Burr. 1647. See R. v. Dr. Windham, Cowp. 377. R. v. Surrey (J.), 2 Show. 74, n. (d), 3rd edit., and see 1 W. Blac. 551. S. C. Burr. 1647. See tits. "Corporation Municipal," "Hospital," (Seal), "Seal," "University."

(l) R. v. Dr. Windham, Cowp. 377. Case of L. H. Steward of Cambridge, 1 W. Blac. 547. R. v. Cambridge (U.), Burr. 1663, per Aston, J., and see 7 Mod. 356, R. v. Dr. Bland. Com. Dig. tit. "Man." (A.); Bac. Abr. tit. "Man." (D.)

(m) R. v. Ely (Ep.), Andr. 176; 1 W. Blac. 54. S. C. 1 Wils. 266. See tits. "Office," (Deprivation.) "Visitor."

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—.] *Visitor; Jurisdiction.*—Although the Court has often stated that it will in cases of colleges, grant the writ in the first instance, and upon the return decide whether it has jurisdiction or not,⁽ⁿ⁾ yet such dicta are merely applicable to cases in which the existence or not of a visitor has been left in doubt upon the argument of the rule;^(o) for if [*81] the affidavits of the prosecutor admit the existence of a visitor, or such a fact be alleged by the defendant and be uncontradicted by the other side, the Court will in its discretion refuse to make the rule absolute.^(p)

As to deprivation of Visitor, see *supra* (*Vice Master*), ante, p. 80.

COMMISSIONER.] *Election, &c.*—The writ has been granted to certify the election of a commissioner appointed under a local or other act of Parliament, and to command a proper meeting to be holden to swear him to the duties of his office; but not if the office be one which may be subject to an information in the nature of a *quo warranto*, and the election be disputable.^(q)

The Court of B. R. has also power to send a writ of mandamus to persons acting under a commission, to know for what cause a deprivation, &c. was made and notwithstanding the commission be determined.^(r)

COMMISSIONS.] See tit. *Militia*.

COMMON BURGESS.] See tits. *Burgess (Common); Office*.

COMMON COUNCILMAN.] See tits. *Councillor; Office*.

COMMONER.] *Election.*—As to the election, &c. of a commoner, see stat. 6 & 7 Vict. c. 89.^(s)

—.] *Admission.*—It lies to admit to the office of commoner of a borough but not unless the prosecutor can shew that he has a perfect right to such admission.^(t)

—.] *Restoration.*—It lies also to command a municipal corporation to restore one to the office of commoner of a borough, if duly entitled.^(u)

COMMON PLEAS COURT.] See tit. *Courts (Superior)*.

(n) R. v. New Coll. &c., 2 Lev. 16. Spelman's Gloss. V. Visitor, cited in R. v. Patrick, 1 Keb. 834; Raym. 101, 102, 103.

(o) See tit. "Visitor."

(p) 10 Mod. 55, per Eyre, J.; 3 A. & E. 285.†

(q) R. v. Beedle, 3 A. & E. 467,† where see direction of writ. R. v. Oxford (Mayor), 6 A. & E. 351, 352.† R. v. Kelk, 15 A. & E. 559.† And see tits. "Act of Parliament," "Compensation," (Company), "Drainage," "Office," (Election.)

(r) R. v. Prin, 609, 686.

(s) Appendix.

(t) R. v. Malmesbury, (High Steward), 4 Jur. 222. See tit. "Office," (Admission).

(u) Emery v. Malmesbury (Aldermen), 3 Q. B. 577,† S. C. 3 G. & D. 482. See tits. "Burgess," "Franchise," "Freedom," "Freeman," "Office," (Restoration).

*COMPANY.] This subject is arranged as follows:—

[*82]

COMPANY.					COMPANY— <i>Calls</i>				
Registration	-	-	-	82	Execution	-	-	-	83
Compensation	-	-	-	82	Books, &c., Inspection, &c. of	-	-	-	83
Directors	-	-	-	82	Delivery, &c.	-	-	-	83
Swearing in	-	-	-	82	Clerk of	-	-	-	84
Duties, &c.	-	-	-	82	Restoration	-	-	-	84
Shares	-	-	-	82	Direction of Writ to	-	-	-	84

—.] *Joint Stock, Registration.*—The writ does not lie to command the registrar of Joint Stock Companies, under stat. 7 & 8 Vict. c. 110, to return a change of the name of a company, after complete registration.(v)

—.] *Compensation.*—See tit. *Compensation.*

—.] *Directors, Swearing in.*—The writ will be granted to command the swearing in of a director of a chartered company.(w)

—.] *Duties, &c.*—A company, though in the nature of a private body of undertakers, is compellable by mandamus to do what its public duty and general interests require, and that has been held even in a case where the prosecutor might have proceeded by indictment, the Court saying, that the remedy by mandamus is never more beneficial than when enforcing the performance of a duty.(x) So it will lie to command a company, which has power under certain circumstances to elect whether or not it will do a certain act, to perform such act after it has elected to do it.(x)

But the Court of B. R. will not interfere with the mere private transactions of a company. Thus a mandamus to the London Insurance Company to permit a transfer of stock to be made in their books was refused, because the company, although incorporated by charter, was a mere private partnership, and that a mandamus being a high prerogative writ, is confined to cases of a public nature.(y)

—.] *Shares.*—Nor does it lie to command the transfer of shares in a public company, standing in the name of a bankrupt, into the names of his assignees; the Court in giving judgment, holding that it was not a case in which the Court would interfere by mandamus, and that though perhaps several exceptions to the contrary might be found, yet the writ of mandamus was confined in principle to cases where the matter was of public and general importance, and not to cases of mere private right, especially where there is another remedy either by action or suit in equity: and that the Court had refused in a similar, though much stronger, case to grant a mandamus.(z)

(v) In re Sheffield Insurance Company, 16 L. J., N. S., Q. B. 407.

(w) See tits. "Amicable Assurance Company," "Office," (Swearing in); Str. 696; Com. Dig. tit. "Man." (A.)

(x) R. v. Severn Railway, 2 B. & Ald. 646. R. v. Wilts Canal, 3 A. & E. 482.† S. C. 5 N. & M. 344.†

(y) R. v. London Insurance Company, 5 B. & Ald. 899,† cited in R. v. Wiltshire Canal, 5 N. & M. 347.† S. C. 3 A. & E. 483.† See also tit. "Bank of England."

(z) Ante, p. 18, 22. R. v. Amicable Assurance, Stra. 696, where the Court

*But the Court will command the company to enter upon its [*83] books the probate of a deceased shareholder, leaving any question as to the validity and effect of the probate, to be raised by the return.(a)

—.] *Calls, Payment.*—Where the directors of an incorporated company authorized to make calls on the shareholders, had made calls which had not been paid, and the original directors had all ceased to be so, and no new directors had been appointed, the Court refused a mandamus to command the company to enforce the payment of the calls that had been made.(b).

—.] *Execution.*—Where an act of Parliament incorporating a company, directs that actions in respect of claims upon the company shall be brought against the treasurer, but that his effects shall not be taken in execution, a mandamus will issue to the directors, &c. of the company, commanding them to pay the money recovered in such action.(c) So if it be clearly established that such directors are evading the payment of its debts and the due satisfaction of judgments recovered against it, on the ground that they have no corporate assets actually in possession, the Court of B. R. would not perhaps be going beyond the principle which regulates its extraordinary interposition by mandamus, if it compel them to exercise that power with which the Legislature has trusted them for this purpose, in order to put themselves in funds to answer the demands of their creditors.(d)

—.] *Books, Accounts, &c.; Inspection, Delivery, &c.*—It lies to command a company to allow a proprietor to inspect all books, accounts, papers, and writings belonging to the company, and kept in pursuance of their act or charter, &c., and to take copies thereof or extracts therefrom, such right being conferred on the proprietors by such act, &c. ;(e) but if no Parliamentary direction on the subject be shewn, the Court will refuse the writ.(f) A special reason for desiring to see the accounts must in some cases be stated, as where there is only a right of limited inspection, [*84] and if necessary, it must be shewn that when demand of inspection was made, the object for *which it was wanted was stated, for before

granted a mandamus to that Society to swear in a director. *R. v. England (Bank)* 2 B. & A. 629.† *R. v. London Assurance*, 1 D. & R. 510.† *S. C.* 5 B. & A. 899.† See tits. “Bank of England.” “Corporation.” (Trading).

(a) *R. v. Worcester Canal*, 1 M. & R. 529. See post, tit. “Return.”

(b) *R. v. Victoria Park*, 4 P. & D. 639. *S. C.* 1 Q. B. 288, 293.† and note (b), *ibid.* this case being distinguishable from that of *St. Katherine's Dock*, 4 B. & Ad. 360.† *S. C.* 1 N. & M. 121.† *R. v. Nottingham Old Works*, 6 A. & E. 335.† *S. C.* 1 N. & P. 480.† See the judgment of Patteson, J., 6 A. & E. 369, 370.† *R. v. Market Street Commissioners*, 4 B. & Ad. 333 n.(a).† *Corpe v. Glyn*, 3 B. & Ad. 801.† See *infra* “Execution,” and *ante*, p. 16.

(c) *Ante*, p. 23, 24. *R. v. St Katherine's Dock*, 1 N. & M. 121.† *S. C.* 4 B. & Ad. 369.† *Wormwell v. Hailstone*, 6 Bing. 676.

(d) *R. v. Victoria Park*, 4 P. & D. 463. *S. C.* 1 Q. B. 292.† See tits. “Compensation.” (Office, Payment), “Money.”

(e) *R. v. Wiltshire Canal*, 5 N. & M. 344.† *S. C.* 3 A. & E. 483.† *R. v. London Insurance*, 5 B. & Ald. 899.† See tits. “Books, &c.,” “Corporation Municipal,” (Books, &c.) “County,” (Accounts), “Manor,” (Court Rolls Inspection.)

(f) *R. v. Bank of England*, 2 B. & Ald. 620. *R. v. Clear*, 7 D. & R. 395.† *S. C.* 4 B. & C. 899.† See tits. “Act of Parliament,” “Bank of England.”

the Court of B. R. will allow such a mandamus to issue, the motive of the party desiring inspection, &c. must appear, in order that the Court may see that the motive is a proper one.(g) It is, however, sufficient to shew that legal proceedings are bona fide contemplated.(h)

There must be a demand and refusal previously to the application for the writ.(i)

It is a rule as to mandamus for the inspection, &c. of documents, that it lies only to inspect those which are kept for the use of a body of persons of whom the applicant is one.(j) Thus where parties hold books, &c. as trustees the Court will grant inspection to persons interested, and that without any specific reason assigned.(k)

It lies also to command the ex-clerk of a company to deliver the company's books to his successor.(l)

—.] *CLERK OF PRIVATE. Restoration.*—The writ has been refused to command restoration to the place of clerk of a company, as of the Company of Butchers in London, although it be an office instituted by charter and a freehold, for it is not a public office(m) but a private one, for which a mandamus does not lie; and although the clerk have a freehold in such office, for he may have an assize or an action on the case.(n)

From a review, however, of the older cases, it would seem that the mandamus should have been granted, for it has been said that the writ has been granted for clerks of private companies since Lord Holt's time.(o) So in White's case, supra, it is stated(p) that the mandamus was granted, the Court there alleging as the ground of its judgment, that it was the same case with that of a town clerk.(q)

A mandamus cannot be directed to the clerk of a private company, being too inferior an officer.(r)

(g) R. v. Clear, 7 D. & R. 393.† S. C. 4 B. & C. 899;† 5 N. & M. 351.† S. C. 3 A. & E. 483.† supra. See post, tit. "Application," (Demand and Refusal). Ante p. 16.

(h) R. v. Tower Hamlets, 3 G. & D. 95. S. C. 3 Q. B. 670,† citing R. v. Tower, 4 M. & S. 162.†

(i) See tit. "Application," (Demand and Refusal), and see 7 D. & R. 393.† S. C. 4 B. & C. 899,† as to its form.

(j) R. v. Westover (Overseers). 1 N. & P. 222.† S. C. 5 A. & E. 786.† Southampton (Mayor) v. Graves, 8 T. R. 590. R. v. Ely (Ep.), 2 M. & R. 127. S. C. 8 B. & C. 112.†

(k) 3 A. & E. 482.† S. C. 5 N. & M. 344. See tit. "Books, &c."

(l) R. v. Wildman, Stra. 879; 1 Barn. 402, 405, 406. See 3 Bac. Abr. tit. "Man." A.; S. C. R. v. Wheeler, Cas. t. Hard. 99. S. C. Cunn. Rep. 155. R. v. Ingram, 1 W. Blac. 50; Com. Dig. tit. "Man." (A). See tits. "Blacksmiths' Company," "Books, Records, &c." "Town Clerk," (Rolls, &c.).

(m) White's case, 6 Mod. 18. S. C. 3 Salk. 232. S. C. Ld. Raym. 1004. R. v. London (Mayor), 2 T. R. 177, 182, n. (b). See tits. "Butchers' Company," "Office."

(n) Ante, p. 18, 19.

(o) R. v. London (Aldermen), 2 Barn. 398; Fitz. Nat. Brev. 218.

(p) White's case, Ld. Raym. 1004.

(q) See Audley's case, Poph. 176.

(r) R. v. Wiltshire Canal, 5 N. & M. 349,† per Littledale, J., citing R. v. Jeycs, 5 N. & M. 101.† See tit. "Office," (Ministerial Inferior).

[*85] *COMPENSATION.] This subject is arranged as follows:—

COMPENSATION.					COMPENSATION.				
Company	-	-	-	85	Office	-	-	-	87
Assessing	-	-	-	85	Assessing	-	-	-	87
Judgment	-	-	-	86	Bond	-	-	-	88
Payment	-	-	-	86	Payment	-	-	-	88
Costs	-	-	-	86	Rioters	-	-	-	88
Application	-	-	-	87	Sheriffs	-	-	-	89
Affidavits	-	-	-	87					

—.] *Company*.—It is clearly settled, that where individuals, or a company are empowered to take, and do take lands in pursuance of their act, &c., they can, after an election so to take, be obliged by mandamus to proceed to a due valuation of them.(s) Thus it lies to command commissioners acting under stat. 35 Geo. 3, c. 106, to hear, report, and adjudge upon a complaint, and claim for compensation under such statute.(t) So it lies to command a magistrate to hear a complaint against a company, for having taken possession of certain land, and to have the amount of compensation settled according to the terms of their act.(u)

—.] *Assessing*.—So the writ lies to command a railway or other company, incorporated by act of Parliament, to issue a warrant or other statutory process, and summon a jury for the purpose of assessing compensation or damage incurred in pursuance of its act.(v) So it lies to command the sheriff to execute the warrant or precept, and impanel the compensation jury;(w) but where an inquisition has been duly taken, the

(s) *R. v. Stainforth Canal*, 1 M. & S. 33. *R. v. Harham Roads*, 4 Jur. 50. See tits. "Act of Parliament," "Canal Company," "Company," "Drainage," "Railway."

(t) *R. v. Thames Commissioners*, 8 A. & E. 901.† See tits. "Act of Parliament," "Commissioner."

(u) *R. v. Bingham*, 4 Q. B. 877.† See tit. "Quarter Sessions," (Justices).

(v) *R. v. Stainforth Canal*, 1 M. & S. 33. *R. v. Bagshaw*, 7 T. R. 363. *Re Palmer*, 9 A. & E. 463.† *S. C.* 1 P. & D. 492. *R. v. Bristol Dock*, 12 East, 429. *R. v. Nene Outfall*, 9 B. & C. 875.† *R. v. Liverpool Railway*, 6 N. & M. 186.† *S. C.* 4 A. & E. 650.† *R. v. London Dock*, 6 N. & M. 390.† *S. C.* 5 A. & E. 163.† *R. v. London Railway*, 2 P. & D. 243. *S. C.* 10 A. & E. 3.† *Ex parte Farlow*, 2 B. & Ad. 341, 348.† *R. v. Eastern Counties Railway*, 1 G. & D. 589.† *S. C.* 2 Q. B. 347.† *S. C.* 11 L. J., N. S. 66. Q. B. *R. v. London Railway*, 2 G. & D. 444. *S. C.* 3 Q. B. 166.† *S. C.* 11 L. J., N. S. 187. Q. B. *R. v. Leeds Railway*, 5 N. & M. 246.† *S. C.* 3 A. & E. 683.† *Ex parte Parkes*, 9 D. 614; 5 Jur. 435; 1 Wol. P. C. 158. *R. v. Nottingham Waterworks*, 5 N. & M. 498.† *R. v. Hungerford Market*, 2 N. & M. 340.† *S. C.* 1 A. & E. 668.† *Re London Railway*, 4 N. & M. 458.† *S. C.* 2 A. & E. 678.† *R. v. Hungerford Market*, 4 B. & Ad. 327.† *S. C.* 1 N. & M. 112.† 4 B. & Ad. 592.† *S. C.* 1 N. & M. 406.† 4 B. & Ad. 596.† *S. C.* 1 N. & M. 548.† 3 N. & M. 622.† *S. C.* 1 A. & E. 676.† *R. v. Market Street Commissioners*, 4 B. & Ad. 333.† n. (u). *R. v. Northern Railway*, 8 D. 329. *S. C.* 9 L. J., N. S. 53. Q. B. *R. v. Wilts Canal*, 8 D. 623; and see *R. v. The Eastern Counties Railway*, 2 D., N. S. 948, as to second hearing and trial. *R. v. Birmingham Canal*, 4 Jur. 318. *R. v. Eastern Counties Railway*, 5 Jur. 365. *R. v. North Midland Railway*, 2 Rail. Cas. 1. *R. v. East Lancashire Railway*, 16 L. J., N. S. 127, Q. B. *Ex parte Reynal*, 16 L. J., N. S. 304. Q. B.

(w) *R. v. Middlesex (Sheriff)*, 3 G. & D. 549. *S. C.* 13 L. J., N. S. Q. B. 14. *S. C.* nom. *Walker v. London Railway*, 3 Q. B. 549, 744.† *S. C.* 5 Q. B. 365.† *S. C.* 12 L. J., N. S. 88. Q. B. *R. v. Eastern Counties Railway*, 12 L. J., N. S. 271, Q. B. See tit. "Sheriff."

Court of B. R. *will not grant a new precept on the ground of [*86] misdirection, or the improper rejection of evidence, or that the verdict was against evidence, and the damages grossly insufficient.(x)

—.] *Judgment*.—It lies also, to command the entering up by the proper officer, of judgment, for the compensation money awarded,(y) but not otherwise, that in the terms in which the verdict was given by the jury, even although it appear by affidavit, that in considering the amount of damages, to be assessed by them, they took into consideration matters not properly within their jurisdiction,(z) and notwithstanding it appear upon the face of the proceedings that the jury assessed separate damages, in respect of matters foreign to their jurisdiction, and although such finding be a nullity, and cannot be enforced.

—.] *Payment of*.—The writ does not lie to command payment of such compensation, when assessed in those cases where an action lies, as where it arises upon a statutory obligation.(a) So where a power to distrain exists,(a) the writ will be refused.(b)

But in all those cases in which there does not exist a specific legal remedy, whereby payment of the compensation may be enforced, the writ of mandamus lies to command it,(c) or to enforce generally the inquisition of the compensation jury, or other instrument by which it is awarded;(d) but not the costs of the inquisition, or of title, unless specially ascertained.(e)

—.] *Costs*.—So if the company refuse to pay the compensation awarded, or the costs; a mandamus will be granted to compel them so to do, although the statute make the verdict and judgments records of the Quarter Sessions.(f)

It also lies to command a coroner to review his taxation of a bill of costs, *in respect of an inquisition taken before him for assessing [*87] compensation under a Railway Act.(g)

(x) *R. v. Eastern Counties Railway*, 2 D., N. S. 945. S. C. 12 L. J., N. S. 271, Q. B. citing *R. v. Sheffield Railway*, 11 A. & E. 194,† S. C. 3 P. & D. 111. See tits. “Courts Inferior,” (Rehearing, &c.), “Quarter Sessions,” (Rehearing, &c.)

(y) *Amburst’s case*, Ray. 214. S. C. 1 Vent. 187. S. C. 2 Keb. 871. See tits. “Courts Inferior,” (Judgment), “Judgment,” “Quarter Sessions.”

(z) *R. v. West Riding (J.)*, 3 Nev. & M. 802,† See tit. “Judgment.”

(a) Ante, p. 29. *R. v. Hull Railway*, 13 L. J., N. S. 257, Q. B. S. C. 8 Jur. 491. S. C. 6 Q. B. 70,†

(b) Ante, p. 21, 22. *R. v. London Railway*, 15 L. J., N. S. 42, Q. B. S. C. 3 D. & L. 399. See tit. “Distress.”

(c) *R. v. Thames*, 5 A. & E. 804,† where see form of writ; 6 A. & E. 355, 367,† S. C. 1 N. & P. 480,† supra. *R. v. Swansea Harbour*, 1 P. & D. 512. S. C. 8 A. & E. 439,† *R. v. Great Western Railway*, 1 D. & M. 471. S. C. 5 Q. B. 597,† *R. v. Deptford Pier*, 3 A. & E. 910,† See tit. “Company,” (Execution), ante, p. 18.

(d) 1 P. & D. 512. S. C. 8 A. & E. 439,† supra, and see 8 A. & E. 910,† supra, and see *R. v. West Riding (J.)*, 3 N. & M. 802,†

(e) *R. v. London Railway*, 15 L. J., N. S. 42, Q. B. S. C. 3 D. & L. 399. See tit. “Costs,” and infra (Costs).

(f) *R. v. Nottingham Old Waterworks*, 6 A. & E. 355,† and see 8 A. & E. 447, 448,† *R. v. York (J.)*, 1 A. & E. 828. S. C. 3 N. & M. 685,† and see *R. v. Gardner*, 6 A. & E. 112,† See tit. “Costs.”

(g) *R. v. Gardner*, 1 N. & P. 308;† 6 A. & E. 112,† S. C.

—.] *Application*.—The application should be made to the Court within a reasonable time after the land, &c. is taken, or elected to be taken, by the company, especially if the parties have another remedy.^(h) So the Court will refuse it if the company be proceeding bona fide, although considerable delay may have taken place on its part;⁽ⁱ⁾ but it is no ground for refusing the writ in such a case, that the period of time to which the powers of the act of Parliament, under which the defendant should have acted, have elapsed.^(j)

—.] *Affidavits*.—The affidavits should, if possible, show that the prosecutor has a good title, and is ready to convey, &c., or that he has endeavoured to get a good title, but could not.^(k)

—.] *Office Assessing*.—It lies also to command a municipal corporation to assess compensation for the loss of a corporate office under stats. 5 & 6 Wm. 4, c. 76, s. 35, and 5 & 6 Vict. c. 111,^(l) and also to command the Lords of the Treasury to hear and determine the merits of an appeal on a claim to be allowed compensation for the loss of such an office;^(m) but the Court will not decide as to the principle on which the decision is to be founded.⁽ⁿ⁾ Also, if the lords have in fact heard and determined the appeal under s. 66, the Court will not interfere, though it may be satisfied that compensation has been awarded on an erroneous principle.^(o) So the Court will refuse a writ to command the Treasury Lords, to hear, &c., if it appear that the subject-matter is not within their jurisdiction.^(p) The Court of B. R. will grant a mandamus to enforce the order for compensation of the Lords Commissioners, but not at the instance of one whose office is not within the contemplation of the act,^(q) [*88] for the Court will not interfere *in any such case, except when the right is quite clear.^(r) And where a town council, in obedi-

(h) Ante, p. 18. R. v. Stainforth Canal, 1 M. & S. 32. R. v. Cockermouth Inclosure, 1 B. & Ad. 380.† R. v. Leeds Canal, 11 A. & E. 316.† S. C. 3 P. & D. 174, and see 4 B. & Ad. 327,† and 3 A. & E. 221, 222.† See post, tit. "Application."

(i) Ex parte Parkes, 9 D. 614.

(j) 8 A. & E. 911.† supra. See tits. "Act of Parliament," "Affidavits."

(k) R. v. Deptford Pier, 8 A. & E. 910.† See tit. "Application" (Affidavits).

(l) R. v. Cambridge (Mayor), 12 A. & E. 702.† S. C. 4 P. & D. 294, where see form of writ and pleadings. R. v. Manchester (Borough), 16 L. J., N. S. 27, Q. B., where see a form of writ. R. v. Warwick (Corp.), 10 A. & E. 386.† S. C. 9 L. J., N. S. 265, Q. B. R. v. Manchester (Mayor), 5 Q. B., 402.† Ex parte Harvey, 3 N. & P. 159. R. v. Warwick (Corp.), 3 P. & D. 429. R. v. Stamford (Mayor), 6 Q. B. 433.†

(m) R. v. Treasury Lords, 10 A. & E. 374.† S. C. 2 P. & D. 498; and see 10 A. & E. 385.† R. v. Treasury Lords, 10 A. & E. 179.† S. C. 2 P. & D. 369. See tit. "Treasury Lords."

(n) 10 A. & E. 179.† supra.

(o) 10 A. & E. 179.† S. C. 2 P. & D. 369, supra. See tit. "Quarter Sessions" (Appeal).

(p) 10 A. & E. 179.† S. C. 2 P. & D. 369, and 10 A. & E. 374.† S. C. 2 P. & D. 498, supra. Ante, p. 16.

(q) R. v. Bridgewater (Mayor), W. W. & D. 129; 6 A. & E. 339.† S. C. 1 N. & P. 466.† supra. R. v. Poole (Corp.), 7 A. & E. 735, 737, 743.† S. C. 3 N. & P. 119. R. v. Treasury Lords, 10 A. & E. 183.† See also R. v. Treasury Lords, 10 A. & E. 380.† R. v. Carmarthen (Mayor), 11 A. & E. 13.† R. v. Cambridge (Mayor), 12 A. & E. 708.† (r) R. v. Jotham, 3 T. R. 575. Ante, p. 27.

ence to a mandamus, assessed compensation for the loss of certain offices of profit under the provisions of stat. 5 & 6 Wm. 4, c. 76, and the Lords of the Treasury, on appeal, assessed a larger amount of compensation, it was held that the assessment, under the writ, estopped the town council from denying the claim to compensation, and therefore the Court of B. R. was right in granting a mandamus calling upon the town council to execute a bond according to the provisions of the act, to secure the amount assessed by the Lords of the Treasury.(s)

—.] *Bond*.—So the writ lies to command a municipal corporation to prepare and execute a bond under its common seal, to secure the payment of an annuity, &c., ascertained and awarded by the Lords of the Treasury for the loss of a corporate office, over which they had jurisdiction.(t) For wherever the Lords of the Treasury make an order on the town council of a borough for compensation, the Court of B. R. will, on a neglect or refusal by them to comply therewith, enforce its fulfilment by mandamus.(u)

—.] *Payment*.—So it lies to command a municipal corporation to enforce payment of the existing borough rates, or to make and cause to be collected another borough rate, and therewith pay instalments on a compensation bond; but such a writ must show that the corporation has, or professes to have, no other means of payment.(v)

So the Court on a proper case will grant a mandamus to restore to the office, or for compensation for the removal.(w) But the Court will refuse such a writ where the refusal of the town council to award compensation has been confirmed by the Treasury Lords, or where the right to compensation is purely nominal.(x)

—.] As to damage done by Rioters, see tit. *Riots*.

*—.] *Sheriffs*.—It lies also to command compensation to sheriffs on abolition of fees under stat. 55 Geo. 2, c. 50, s. 10.(y) [*89]

(s) *Sandwich (Mayor) v. R.*, 16 L. J., N. S., Q. B. 432.

(t) *R. v. Norwich (Mayor)*, 3 Q. B. 285.† S. C. 2 G. & D. 605; 11 L. J., N. S. 246, Q. B. *R. v. York (Mayor)*, 3 Q. B. 550.† S. C. 2 G. & D. 580. S. C. 11 L. J., N. S., 326, Q. B., where see form of writ. S. C. 6 Jur. 1082. *R. v. Newbury (Mayor)*, 1 Q. B. 751.† S. C. 1 G. & D. 388. S. C. 2 G. & D. 109, where see form of writ. S. C. 2 Jur. 821. *R. v. Sandwich (Mayor)*, 2 G. & D. 28. S. C. 2 Q. B. 895; † 1 N. & P. 466.† S. C. 6 A. & E. 339,† supra. *R. v. Poole (Mayor)*, 3 N. & P. 119. S. C. 7 A. & E. 730.† *R. v. Cambridge (Mayor)*, 4 P. & D. 294. S. C. 12 A. & E. 702.† where see form of writ, &c. S. C. 10 L. J., N. S. 25, Q. B. *R. v. Norwich (Mayor)*, 8 A. & E. 633.† *R. v. Swansea Harbour*, 11 A. & E. 68.† *R. v. York (Mayor)*, 8 D. 502. *R. v. Liverpool (Mayor)*, 3 N. & P. 280. S. C. 8 A. & E. 176.† *R. v. Swansea (Mayor)*, 3 P. & D. 16. S. C. 9 L. J., N. S. 17, Q. B. *R. v. Carmarthen (Mayor)*, 3 P. & D. 35. S. C. 9 L. J., N. S. 25, Q. B. *R. v. Sandwich (Mayor)*, 11 L. J., N. S. 132, Q. B. *Sandwich (Mayor) v. R.*, 16 L. J., N. S. 432, Q. B. See tit. "Lectureship," (Compensation).

(u) 1 N. & P. 466.† S. C. 6 A. & E. 339,† supra. See tit. "Act of Parliament."

(v) *R. v. Poole (Mayor)*, 1 Q. B. 616. S. C. 1 G. & D. 728. See tits. "Borough Rate," "Company," (Execution), "Money."

(w) *R. v. Newbury (Mayor)*, 1 G. & D. 388. S. C. 1 Q. B. 751.† See tit. "Office" (Restoration).

(x) *Ex parte Lee*, 7 A. & E. 139.† S. C. 2 N. & P. 63; W. W. & D. 471; 1 Jur. 474, cited in *R. v. Warwick (Corp.)*, 3 P. & D. 430. See ante, p. 15.

(y) *R. v. Middlesex (J.)*, 3 B. & Ad. 100.† See tit. "Sheriffs."

CONFIRMATION.] The writ has been granted to command a bishop to confirm children.(z)

CONSECRATION.] See tit. *Bishop*.

CONSTABLE.] It lies for a constable, he being a known officer concerned in the peace, and appointed to administer justice in relation to the public.(a)

This subject is arranged as follows :—

CONSTABLE.					CONSTABLES— <i>Allowance</i> - - - 90				
Admission	-	-	-	89	Payment	-	-	-	90
Appointment	-	-	-	89	Reimbursement	-	-	-	90
Swearing in	-	-	-	89	HIGH CONSTABLE.				
Restoration	-	-	-	90	Reimbursement by	-	-	-	90
Accounts	-	-	-	90	Bond	-	-	-	90

—.] *Admission*.—The writ lies to command the admission of a constable to his office.(b)

—.] *Appointment*.—So a mandamus will be granted to command the lord of a manor to hold a Court Leet, for the purpose of appointing a high constable of a hundred, although the day on which the Court had usually been held for sixty years past, had gone by, it not being sworn that the Court was held on that particular day by prescription.(c)

—.] *Swearing in*.—So it lies to command the swearing in of a constable.(d) Thus, it lies to command justices to swear in constables appointed at the leet during their absence, and who could not, therefore, be sworn in at such Court.(e) So it lies to command the steward of a Court Leet to swear in a constable appointed by him; but if he be not a steward by patent he cannot hold a Court without the lord's direction; so that it would appear by affidavits in support of the application, in what [*90] way the steward is appointed, in order to obviate an answer to the application, that since the writ, there has been no Court held at which to swear, &c.(f)

—.] *Restoration*.—So it lies to restore a constable improperly de-

(z) Case of St. Burian's Dean, cited in *R. v. Patrick*, 2 Keb. 66. S. C. 2 Keb. 165, per Moreton, J.; Fitzh. N. B. 200. A. See Middleton's case, 1 Sid. 169, per Windham, J. See tits. "Abbot," "Bishop," "Chrism."

(a) *R. v. Kingsleere* (Churchwardens), 2 Lev. 18. *Estwick v. London (City)*, Sty. 42; *Anon. Poph.* 12, 13; see also Stamp's case, Raym. 12. *Anon. Freem.* 21; Bac. Abr. tit. "Man." C. See tit. "Office."

(b) *Adm. Noy.* 78, dub. Constable's case, 1 Buls. 174, which was a writ of restitution: Com. Dig. tit. "Man." (A.); Bac. Abr. tit. "Man." (C.)

(c) *R. v. Milverton* (Manor), 3 A. & E. 284,† S. C. 1 H. & W. 282. See tits. "Man." (Leet), "Office" (Appointment).

(d) *Patrick's case*, Raym. 111. *R. v. Oxenden*, 1 Show. 219. Constable's case, Comb. 285; *Serv. on Copyh.* 715, n. (a) 4th edit.; *Trem. Pl. Cor.* 471, where see form of writ. See tit. "Office" (Swearing in).

(e) *Anon.* 2 Barn. 129; and see 1 Salk. 175.

(f) Comb. 285, supra; *Serv. on Copyh.* 715, n. (a), 4th edit.

prived of his office, (g) of which there are precedents as ancient as the times of Edw. 2, 3, and Hen. 6. (h)

—.] *Accounts, Allowance.*—It lies to command justices at sessions to enter continuances, and hear an appeal against the allowance by them of the constable's accounts, under stat. 18 Geo. 3, c. 25, s. 5; (i) or against the allowance of a certain item in such accounts. (j)

—.] *Payment.*—The Court will not interfere to command a constable to pay money levied by him in his official capacity, and over which the Court of Quarter Sessions, has an equally effective jurisdiction. Thus, where a constable had levied money under a distress and sale, but afterwards had rescinded the sale, under the idea that it was erroneous, and had restored the money to the purchaser, and the goods to the owner, the Court refused to interfere. (k)

—.] *Reimbursement of.*—It has been granted to command the treasurer of a county to reimburse constables certain extraordinary charges in providing carriages for the king's forces under stat. 1 Geo. 1, c. 34, on the expedition into Scotland. (l) But it was held not to lie to command the treasurer of a county to reimburse constables under the stat. 17 Geo. 2, c. 5, ss. 16, 17, relating to rogues and vagabonds, &c., until such accounts had been allowed by the Quarter Sessions. (m)

HIGH CONSTABLE.] *Reimbursement.*—It has been held not to lie for the purpose of procuring the reimbursement to a parish, upon which the high constable had levied excessive rates, in disobedience of an order of sessions for the Court of B. R. will not command the magistrates in sessions to do that which may occasion costs, for which they have no means of reimbursing themselves. (n)

—.] *High Constable's Bond.*—It lies to command justices, or the *clerk of the peace, to put in suit a high constable's bond, given * [91] under stat. 12 Geo. 2, c. 29, but not if the condition be not strictly in accordance with the statute, otherwise the Court would be lending its assistance to enforce an illegality. (o)

(g) Middlecot's case, 10 Eliz., cited in Awdley's case, Poph. 176. See note 28 to Middleton's case, 2 Dyer, 332 b. 333, pl. 28; Latch. 123; Noy. 78. But see Constable of Stepney's case, 1 Buls. 174; and London (City) v. Eastwick, Sty. 33, which were writs of restitution; Bac. Abr. tit. "Man." (C.) See tit. "Office" (Restitution). (h) Ante, p. 2, Poph. 176, supra.

(i) R. v. Manchester (J.), D. & R. 454. S. C. nom. R. v. Lancash. (J.), 5 B. & A. 755,† citing R. v. Pascoe, 2 M. & S. 343.

(j) R. v. Lancash. (J.), 5 B. & A. 755.†

(k) Morley v. Stacker, 6 Mod. 83; the Court saying that if the mandamus went, and he should disobey it, the Court could only fine him for the contempt, which the justice of the peace, who granted the warrant, could do as well. R. v. Nash. Id. Raym. 989. S. C. 1 Salk. 147. See tit. "Office" (Ministerial, Inferior).

(l) Hunt's case, H. 3 G., and E. 4, G.; Stra. 42, 93; Com. Dig. tit. "Man." (A.)

(m) R. v. Erle, Burr. 1197, 1198; Bac. Abr. tit. "Man." C. 2. See tit. "County" (Treasurer.)

(n) 4 N. & M. 312,† supra. See ante, p. 17. See tit. "Quarter Sessions" (Justices).

(o) Ante, p. 16. In re Lodge, 2 A. & E. 123.† S. C. 4 N. & M. 312,† nom. Ex parte Carlton High Dale (Inhabts).

CONTRACT.] The writ does not lie to command a public board, as the Lords Commissioners of the Admiralty, to carry a contract into effect.(p) But it has been granted to command an overseer to pay a sum of money in pursuance of a parish contract.(q)

CONVICTION.] *Appeal*.—The writ has in numberless cases been granted to command inferior jurisdictions to enter continuances, and hear an appeal against a record of conviction, where a right to appeal is given, &c.(r)

—.] *Judgment, &c.*—So it lies to command the Quarter Sessions or justices to enforce a conviction,(s) if clearly good, but not if its validity be doubtful;(t) as to commit to prison in pursuance of a conviction,(r) or to command the issue of a distress warrant for the levying of a penalty under a conviction.(v) There must, however, be a legal and formal conviction.(x) So that the Court has refused to command a magistrate to enforce a conviction, where it was returned that, notwithstanding the defendant was convicted of a penalty, yet that the conviction was invalid in law, and that there was not an offence for which the penalty was payable or could legally be levied.(y) So where justices, having made a conviction, refused to take any steps to enforce the conviction, under an idea that they would thereby render themselves liable to a penalty under the Habeas Corpus Act, this Court in its discretion refused a mandamus to the justices to compel them to issue a warrant of commitment or of distress, upon the conviction.(z)

It is submitted, however, that as the stat. 6 & 7 Vict. c. 67, s. 3, in [*92] demnifies* for all acts done under a peremptory mandamus, that the Court will not now require so strict proof of the correctness of a conviction.(a)

As to a mandamus for the costs of a conviction, see tit. *Costs*.

—.] *Record*.—The writ also lies to command justices or the Court

(p) *Ex parte Pering*, 4 A. & E. 949,† S. C. 6 N. & M. 477.† See tits. "Act of Parliament" (Application), "Patent."

(q) *R. v. Beeston*, 3 T. R. 592. See tits. "Money," "Overseer," "Parish."

(r) *R. v. Staffordsh. (J.)*, 12 East. 571. *R. v. Hants (J.)*, 1 B. & Ad. 654.† *R. v. Middlesex (J.)*, 6 M. & S. 279. *R. v. Oxfordsh. (J.)*, 1 M. & S. 416. *R. v. West Riding (J.)*, 3 M. & S. 493. *R. v. Middlesex (J.)*, 6 M. & S. 279. *R. v. Huntingdonsh. (J.)*, 5 D. & R. 588. *R. v. Bedfordsh. (J.)*, 3 P. & D. 21. *R. v. Chesh. (J.)*, 3 P. & D. 23. n.(a). *R. v. Bolton (Recorder)*, 14 L. J., N. S. 33, M. C. See tits. "Courts, Inferior" (Appeal), "Quarter Sessions" (Appeal).

(s) *R. v. Warwicksh. (J.)*, 2 A. & E. 768.† *R. v. Broderip*, 7 D. & R. 861.† S. C. 5 B. & B. 239. *R. v. Middx. (J.)*, 2 H. & W. 222. *R. v. Robinson*, 2 Smith, 274. *Ex parte Thomas*, 16 L. J., N. S. 57, M. C. See tit. "Quarter Sessions" (Justices).

(t) But see stat. 6 & 7 Vict. c. 67, s. 3, App., which alters the law in this respect.

(v) *R. v. Twyford*, 5 A. & E. 430,† but the right to convict must be clearly shewn.

(w) *R. v. Broderip*, 5 B. & C. 240.† S. C. 7 D. & R. 861.† *R. v. Hughes*, 3 A. & E. 428.† *R. v. Mirehouse*, 2 A. & E. 637.†

(x) *R. v. Jones*, 2 Barn. 239.

(y) *R. v. Robinson*, 2 Smith, 274; but see stat. 6 & 7 Vict. c. 67, s. 3, App.

(z) *Ex parte Thomas*, 16 L. J., N. S. 57, M. C. Ante, p. 12, 13.

(a) See stat. App.

of Quarter Sessions to complete the record of a conviction.(b) Thus it lies to command the insertion in a record of a conviction under stat. 14 Geo. 3, c. 78, of the evidence given on the hearing of the information upon which the conviction was founded, as nearly as possible in the words used by each of the witnesses examined in pursuance of stat. 3 Geo. 4, c. 23, it being suggested that they had omitted many points of the evidence material to the defendant's case.(c) So the like writ has been granted as to convictions under the Game Trespass Act.(d)

COPYHOLD COURT.] See tit. *Manor (Copyhold Court)*.

CORONERS.] It is clear that the writ of mandamus is applicable to the office of coroner.(e)

——. *Election*.—Thus it will be granted to command the proceeding to an election of coroners, under stat. 11 Geo. 1, c. 4, s. 2.(f)

——.] *Duties, &c.*—It lies also to command a coroner to proceed with an inquisition super visum corporis, if duly assembled and properly holden.(g) But not if such inquisition be irregular, for as an inquisition resulting from such an inquiry might be quashed, so the Court will not grant, but on the contrary refuse, a mandamus to command the doing of an useless act. Thus, as a coroner's duty is judicial, and he can only take an inquest super visum corporis, so an inquest in which the jury are not sworn by the coroner himself, and super visum corporis, is absolutely void. Therefore the Court will not, after an adjournment by the coroner of such an inquest, grant a mandamus to compel him to proceed in it; for (as before stated), the only result of such a proceeding would be, that the inquest, if proceeded in, would be bad, and the record might be quashed.(h)

——.] *Payment of Fees, &c.*—It also lies to command the Quarter Sessions to make an order for the payment to a county coroner of a sum of money out of the county rate, due to him under stat. 25 Geo. 2, c. 29, s. 1, for his own fees and for money expended for the duly taking certain post mortem inquisitions,(i) as for mileage.(j)

*But the writ will be refused, if the justices at Quarter Sessions (who have a discretion) be of opinion that, under the circumstances, there is no ground to suppose that the deceased has died any other than a natural, though a sudden, death, and therefore that the

(b) R. v. Jones, 2 Barn. 240. See tit. "Quarter Sessions" (Records).

(c) In re Rix, 4 D. & R. 352,† citing also R. v. Marsh, 4 D. & R. 260.†

(d) R. v. Kiddy, 4 D. & R. 734.† R. v. Warnford, 5 D. & R. 489.†

(e) Scarborough's case, Str. 1180; and see R. v. Woodrow, 2 T. R. 532; Com. Dig. tit. "Man." (A).

(f) See stat. App. See tit. "Office." See also stat. 6 & 7 Vict. c. 89, App.

(g) R. v. Farrand, 1 Chit. 715.† S. C. 3 B. & A. 260.

(h) Ante, p. 15, 16.

(i) R. v. Oxfordsh. (J.), 2 B. & A. 203. R. v. Warwicksh. (J.), 8 D. & R. 147. S. C. 5 B. & C. 439. R. v. Kent (J.), 11 East, 229. R. v. Carmarthensh. (J.), 16 L. J., N. S., M. C. 167.

(j) Supra, 5 B. & C. 430.† S. C. 8 D. & R. 147.†

inquisition has not been duly taken; and the Court of B. R. sees no reason to interfere with that judgment.^(k)

So it lies to command the payment of the fees of a coroner of a borough or franchise; although if such franchise do not contribute to the county rate the coroner will not be entitled to the fees given by stat. 25 Geo. 2, c. 29, or to any fees to be paid by the county.^(l)

As to a coroner's duty in reference to compensations, see tit. *Compensation* (*Company*).

[CORPORATION MUNICIPAL.] This subject is arranged as follows:—

CORPORATION, MUNICIPAL.				CORPORATION, MUNICIPAL.			
Duties, &c.	-	-	- 93	Freedom	-	-	- 96
Insignia Books, &c., Delivery	-	-	- 94	Affixing Seal	-	-	- 96
Books, &c., Inspection	-	-	- 94	By Laws	-	-	- 96
Rule	-	-	- 95	Franchise	-	-	- 96
Compensation	-	-	- 95				

—.] *Duties, &c.*—It is within the jurisdiction of the Court of B. R., to command by mandamus, that all the officers of municipal corporations should do their duty in their respective offices,^(m) they being public officers.

Thus it lies to command them to assemble, and keep Courts or a Hall, and there to transact the business of the corporation,⁽ⁿ⁾ as to sign the corporation leases, &c.^(o) So, the Court of B. R. will in like manner order the doing of every act necessary to the due holding of such Courts. Thus, it will command the steward, &c., to attend with the public books at the next corporate assembly,^(p) or to deliver them up, if improperly detained,^(q) and to command the reception of a vote for the election of municipal officers.^(r)

But it will not command the entry of certain resolutions in the minute books of the corporation, for in order to their validity, they should be entered, when passed, and not afterwards.^(rr)

(k) Ante, p. 12, 11 East. 229, and 16 L. J., N. S., M. C. 167, supra.

(l) R. v. West Riding (J.), 7 T. R. 48, cited in R. v. Oxford (Ep.), 7 East, 351.

(m) 8 Mod. 28; and see stats. 9 Ann. c. 20, st. 11 Geo. 1, c. 4, and 1 Vict. c. 78, s. 26, App. See tits. "Company," "Councillor," (Duties), "Franchise," "Freedom," "Office."

(n) R. v. Kingston-upon-Hull (Mayor), 8 Mod. 210. S. C. Stra. 578. S. C. 11 Mod. 382. See stat. 11 Geo. 1, c. 4, App. Andr. 184; Barn. 82; Bac. Abr. tit. "Man." (D.) See tits. "Courts, Inferior," "Manor" (Court Lect).

The rule for this purpose must be general, and not add "to admit all those to their freedom who have a right to be free, &c.;" for several interests cannot be comprised in one writ, 8 Mod. 210; Salk. 433. See post, tit. "Writ" (Mandatory Clause).

(o) R. v. Liverpool (City), 1 Barn. 82; Andr. 184. Dr. Walker's case. Cas. t. Hard. 214.

(p) Calne's case, Str. 948, where see form of affidavit. S. C. 2 Barn. 235. There must be an affidavit of a refusal to produce. R. v. Wildman, Stra. 879; Com. Dig. tit. "Man." (A.); 3 Bl. Com. 110. See tit. "Church" (Church trustees).

(q) R. v. Ingram, 1 W. Blac. 50. See tit. "Books," &c.

(r) R. v. Leeds (Mayor), 4 P. & D. 632. See post, tit. "Vote."

(rr) Ante, p. 15, 16. R. v. Evesham (Mayor), 3 N. & P. 351. S. C. 8 A. & E. 266.† See tit. "Quarter Sessions" (Records, &c.)

—.] *Jury*.—As to jury, &c., see tits. *Manor*, (*Leet*) *Jury*.

—.] *Insignia Books, Delivery*.—The Court of B. R. is in the constant habit of granting a mandamus to command municipal and parish officers, magistrates, &c., on the determination of their official duties, to deliver up the ensigns of their offices.(s)

So it lies to command an ex-officer as a mayor, or his deputy, to deliver to the present mayor the common seal, books, papers, muniments, records, insignia, mace, and chest keys, being the property of the corporation,(t) and to deliver up and account for all rents, moneys, goods, valuable securities, books and papers of the corporation under stat. 5 & 6 Wm. 4, c. 76.(u)

So, it has been granted to command the delivery of them up to one lately wrongfully turned out of his corporate office,(v) but before the Court will grant such a rule, the prosecutor must have been restored to his office.

—.] *Books, &c., inspection*.—The writ lies to command a municipal corporation to give inspection, and copy to the members thereof,(w) of all its records, bye-laws, books, &c., because they are of a public nature, and *kept for the use of the body at large.(x) Thus where a dispute arose between the freemen of the new corporation of Beyer- [*95] ley, and the corporation with respect to the right of cutting down trees on certain pastures, formerly granted to the burgessess of the old corpo-

(s) 8 Mod. 28; Bac. Abr. tit. "Man." (D.) See tits. "Books, &c.," "Church" (Keys), "Insignia."

(t) 3 Bl. Com. 110. R. v. Buller, 8 East, 388, where see forms of necessary affidavits. R. v. Gaborian, 11 East, 82, 87. R. v. Dublin (Dean), Str. 537. Crawford v. Powell, Burr. 1013. S. C. 1 W. Blac. 229. R. v. Owen, 5 Mod. 314. R. v. Ingram, 1 W. Blac. 50. R. v. Nottingham (Sheriff), 1 Sid. 31. R. v. Clapham, 1 Wils. 305; Stra. 879, 948; Anon. 1 Barn. 402, and Scarborough's case there cited. Northampton's case, 1 Comb. 102. R. v. Witchurch, 2 Barn. 447. R. v. Wheeler, Cas. t. Hard. 99. S. C. Cunn. Rep. 155. If the town clerk, &c., be an attorney or solicitor, his lien must be satisfied, and that before application made. R. v. Sankey, 6 N. & M. 839;† but see R. v. Earle, Burr. 1197; and see tit. "Attorney." (Rolls). See stat. 5 & 6 Wm. 4, c. 76, s. 69; Bac. Abr. tit. "Man." (D.) See tits. "Books," "Insignia," "Town Clerk."

A writ to deliver books does not include the Common Seal. Hastings, H., 24 Geo. 3; Gude's Cr. Pr. 202.

(u) R. v. Greene, 6 A. & E. 548.† S. C. 1 N. & P. 631.† R. v. Frost, 1 P. & D. 75. S. C. 8 A. & E. 822.† But the applicants for such writ must be either the town council, treasurer, or other authorized party, and not any individual having a remote interest in the corporation funds, although ultimately entitled to the money. See tits. "Accounts," "Books," &c. See ante, p. 27, and post, tit. "Application."

(v) R. v. Holford, 2 Barn. 330, 350, and cases there cited, where see as to whom the rule and writ should be directed. See post, tits. "Rule," "Writ," (Direction).

(w) Southampton (Mayor) v. Graves, 8 T. R. 550, and see 5 A. & E. 788.† R. v. Antrobus, 2 A. & E. 788;† 3 Wils. 398. Wanin v. Giles, Stra. 954. See tits. "Accounts," "Books," "Company," "County," "Highway," "Livings, &c.," "Manor," (Rolls, &c.)

(x) R. v. Merchant Taylors, 2 B. & Ad. 115.† R. v. Newcastle (Fraternity), Stra. 1223, 3rd edit., where see an elaborate note upon this subject. Love v. Bentley, 11 Mod. 134. R. v. Ely (Ep.), 8 B. & C. 112.† Ld. Raym. 337; 2 Chit. 288.† R. v. Westowe (Churchwardens), 5 A. & E. 786.† S. C. 1 N. & P. 222.† R. v. Beverley (Mayor), 8 D. 140.

ration, and an injunction to restrain the cutting down of the trees, having been obtained by the corporation, a mandamus was granted at the instance of the freeman, to permit them to inspect the deeds, &c., concerning the pastures in question, which were in the possession of the new corporation, with a view to dissolve the injunction.(y)

As a general rule,(z) however it must always in support of the application be shewn, that such inspection is necessary, with reference to some specific action, dispute, or question depending, in which the applicants for inspection are interested, and the inspection will be *limited* to the requirements of the particular circumstances of the occasion.(a) So that, where applicants for inspection, although members of the corporation, merely alleged as grounds, that they believed that its affairs were improperly conducted, and the officers unduly chosen, and complained of misgovernment in some particular instances, not affecting the parties themselves, or any matter then in dispute, and thereupon applied for a mandamus for inspection, and copy of all records, books, muniments, &c., in possession of the corporation, or relating to its affairs; the Court discharged the rule with costs.(b) Nor will the rule be granted on the suggestion of mere surmise, for the purpose of shaking titles unimpeached at the time of the application.(c) So, the Court has refused inspection of the corporation books to a stranger to the corporation, although an action was pending.(d)

— *Rule*.—The rule absolute for a peremptory mandamus, for inspection and copy, usually commands the corporation to allow the prosecutor or his attorney, to inspect such of the corporation books as relate to the matter in question in the cause, and that the town clerk should give copies of the bye-laws to the prosecutor, the latter paying the expense of such copies, and also paying the town clerk for his attendance.(e)

—.] *Compensation*.—See that title.

[*96] —.] *Freedom*.—See that title, and also *Company, Franchise*.

—.] *Seal, Affixing*.—The Court of B. R. will command the officer who has the legal custody of the corporate seal, to affix it to any document to which it should be affixed in pursuance of the resolution of the majority of such corporation, though such resolution be against the con-

(y) R. v. Beverly (Mayor), 8 D. 140.

(z) R. v. Babb, 3 T. R. 579, per Lord Keynon. C. J.

(a) See ante, p. 16, n. (f). 2 B. & Ad. 115, 122, † supra; Stra. 1223, supra. R. v. Bab, 3 T. R. 579, R. v. England (Bank), 2 B. & A. 620. Harrison v. Williams, 4 D. & R. 820. † Brewers' Company v. Benson, Barnes, 236.

(b) 2 B. & Ad. 115, † supra. See post, tit. "Application for Writ."

(c) 2 B. & Ad. 122, † supra. See ante, p. 16.

(d) Southampton (Mayor) v. Graves, 8 T. R. 590, cited in R. v. Beverly (Mayor), 8 D. 141. Hodges v. Atkis, 3 Wils. 398; 2 W. Blac. 877. Cox v. Copping, 5 Mod. 396. See tit. "Manor," (Rolls, &c.)

(e) 4 D. & R. 823, † supra. See post, tit. "Writ," (Mandatory Clause.)

sent of such officer.(f) Thus, such court has commanded the putting of the corporate seal to the certificate of one, who claimed to have been elected recorder, though the corporation had certified to the Crown the election of another candidate.(g)

See as to the delivering up of the seal, &c., supra, *Insignia*, &c.

—.] *Bye-laws*.—The writ lies to command a meeting to be held in pursuance of a bye-law.(h) But in the absence of any precedent, the Court will refuse a mandamus to command a mayor, &c., to propose a resolution to the burgesses in guild assembled, for repealing certain bye-laws, although it be alleged, that by the charter, bye-laws, and ordinances, may be made; as such a matter is entirely within the discretion of the Mayor.(i)

As the words “*shall be lawful*” in a bye-law are not obligatory, so a mandamus does not lie to enforce them.(j) The words “*shall and may*” are not imperative, but when the cause, respecting which they are used, is for the public good or benefit.(k)

As to inspection of bye-laws, see supra, tit. *Books*, &c., (*Inspection*.)

—.] *Franchise*.—The Court of B. R. may command the officers of a municipal corporation to do their duty but they cannot dictate to them, if judicial officers, the mode of doing it.(l) Thus, where a party has an inchoate right to be admitted a member of a corporation, the Court will enforce his admission by mandamus.(m) There is no judicial power in a body corporate to adjudicate as to whether a person has an inchoate right to be admitted a member of a corporation, such being a mere ministerial duty; and the Court of B. R. will, as before stated, enforce the performance of such duty to admit: if, however, the corporation has an option, as where they are empowered to admit members or not at their discretion, then an admission cannot be enforced by mandamus.(n)

*CORPORATION, TRADING.] *Duties*, &c.—There exists no in- [*97] stance in which the Court has granted a writ of mandamus to a

(f) See ante, p. 12. *R. v. Beeston*, 3 T. R. 594, citing *R. v. Widham Cowp.* 377, with approbation; 3 Bl. Com. 110. See tits. “*College*,” (*Seal*), “*Hospital*,” (*Seal*).

(g) *R. v. York (Mayor)*, 4 T. R. 699. *R. v. Beedle*, 3 A. & E. 475.†

(h) *R. v. Durham (Mayor)*, Burr. 131. See tits. “*Churchwardens*,” (*Election*), “*Parish*,” “*Vestry*.”

(i) *Garrett v. Newcastle (Mayor)*, 3 B. & Ad. 252,† and cases there cited. See ante, p. 12, 13, &c. See form of a return of a bye-law to a writ to admit to the freedom of a city; *R. v. Harrison*, Burr. 1323. S. C. 1 W. Blac. 372. Ante, p. 12, 13.

(j) *R. v. Eye (Bailiffs)*, 2 D. & R. 172. See tit. “*Charters*.”

(k) *R. v. Flockwold Enclosure*, 2 Chit. 251.† *R. v. West Looe (Mayor)*, 5 D. & R. 414.† Bac. Abr. tit. “*Man*,” (D.)

(l) Supra, tit. “*Duties*, &c.,” and post, tit. “*Franchise*,” “*Freedom*,” “*Officer*,” (*Officers Judicial*, &c.)

(m) Per Abbott, C. J., in *R. v. West Looe*, 5 D. & R. 598.† S. C. 3 B. & C. 677.† cited in *R. v. London (Mayor)*, 4 M. & R. 54. S. C. 9 B. & C. 1.† And see tits. “*Burgess*,” “*Resiant*.” *R. v. Physicians’ Coll.*, Burr. 2186. See tit. “*Freedom*.”

(n) See ante, p. 12, 13, &c. *R. v. Eye (Bailiffs)*, 4 B. & A. 271.† S. C. 2 D. & R. 172.† S. C. 1 B. & C. 85.† cited in 4 M. & R. 54. S. C. 9 B. & C. 1,† supra.

trading corporation, having no public duties to perform.(o) The Court has refused to grant a mandamus to a trading corporation, at the instance of one of its members, to compel them to produce their accounts, for the purpose of declaring a dividend of the profits; for, in effect, such a proceeding is but an application on the behalf of one of several partners to compel his co-partners to produce their accounts of profit and loss, and to divide those profits, if any there be; the proper Court for relief in such case being the Court of Chancery.(p)

—.] *Trade Mark*.—So the writ does not lie to command a trading company to give to one of its members a recommendatory mark, without which he is unable to carry on his trade with effect.(q)

CORPSE.] *Delivery up of*.—The writ lies to command a gaoler to deliver up to the executors of the deceased, the body of one who had died while a prisoner in execution in his custody, notwithstanding such executors refuse to satisfy certain claims made against the deceased by the gaoler. The writ in such a case, on account of its urgency, will be peremptory in the first instance; so that if there be any answer to it, it must be shown not by way of return, but on showing cause against a rule why an attachment should not issue.(r)

The erroneous notion that a dead body may be detained for debt, and thereby burial prevented, has long been judicially refuted, on the ground that the exercise of such a power to deprive a body of funeral rights and Christian burial would be revolting to humanity.(s)

As to burial of a corpse, see tit. *Burial*.

COSTS.] *Payment*.—The writ lies to command a magistrate to receive an information and complaint against an overseer for neglecting to pay a specific sum of money, being costs, duly certified by the Court of General Quarter Sessions.(t) So a mandamus has been granted to command inter [498] *alia, the payment of a certain sum for costs,(u) as the costs of a writ of mandamus.(v)

(o) R. v. England (Bank), 2 B. & A. 622.† See tits. "Bank of England," "Company," (Duties). Ante, p. 12.

(p) See tit. "Equity, pp. 22, 23," and see tits. "Accounts, &c.," "Bank of England."

(q) Anon., Ld. Raym. 989.

(r) See ante, p. 16. R. v. Fox, 2 Q. B. 246,† where see the form of the writ. S. C. 11 L. J., N. S. 41, Q. B. S. C. 1 G. & D. 566, nom. In re Bailiff of Wakefield. S. C. nom. In re Jewison, 5 Jur. 989. See R. v. Scott, 2 Q. B. 248,† an indictment for detaining a body. So 25 Geo. 3, Young and Others were indicted for detaining a body from burial, 1 Chit. 595. See post, tits. "Attachment," "Peremptory Writ."

(s) Jones v. Ashburner, 4 East, 465, per Lord Ellenborough, C. J., also cited in R. v. Coleridge and Others, 1 Chit. 595.†

(t) R. v. Long, 1 G. & D. 367. S. C. 1 Q. B. 740. See tits. "Highway," (Repairs, Costs), "Money," (Payment), "Overseer," "Poor," (Costs), "Quarter Sessions," (Justices.)

(u) R. v. St. Katharine Dock, 4 B. & Ad. 360.† S. C. 1 N. & M. 121,† cited in R. v. Clark, 1 D. & M. 690. S. C. 5 Q. B. 887.† See tit. "Company."

(v) R. v. Cambridge (Mayor), 14 L. J., N. S., 82, Q. B. See post, tit. "Costs."

But the Court will not grant the writ for such a purpose if there be another remedy whereby they can be recovered. Thus, the writ will not be granted to command the treasurer of a town or county to obey an order made by a Judge of assize, for payment by him of the costs, &c. of the prosecutor of, and witnesses in an indictment for a misdemeanor under stat. 7 Geo. 4, c. 64, s. 23, both because there exists another remedy, viz. by indictment, and that the treasurer is too inferior an officer to be the subject of the writ.(*w*) Neither will the writ be granted to command the payment of the costs of a former mandamus. Nor for costs given by statute, if it provide specific legal means whereby they may be obtained.(*x*)

As to the procedure by mandamus for the costs of a sheriff's inquisition, and of the costs of title to property taken by railway, see tit "*Compensation*" (*Company*).(*y*)

—.] *Enforcing Payment*.—So it lies to command justices of the peace to enforce the payment of costs, by issuing a distress warrant to levy the same.(*z*) The writ also lies to command the Court of Quarter Sessions to issue a distress warrant for costs awarded on the quashing of a conviction, or, in other words, to allow the means of enforcing their own order to that party in whose favour such order is made.(*a*) The order must, however, be specific and certain in every respect, especially as to the amount of the costs. Thus where a Judge of assize, after the trial of an indictment for nonrepair of a road, under stat. 5 & 6 Wm. 4, c. 50, s. 95, made an order that the costs were to be paid by the parish, but did not insert therein the amount either then or at any subsequent time; the Court of B. R. refused to enforce such an order by mandamus,(*b*) and stated, that it would not call upon a party to pay costs "generally;" that the amount must be properly ascertained and inserted, because the writ must follow the rule, and if that be general the defendant cannot know how he is to perform it, that is, how much he is to pay.

*COUNCILLOR; COUNCILMAN.] *Common or Town*.—The writ lies for the office of common councilman,(*c*) because it is an office [*99]

(*w*) Ante, p. 18—23. R. v. Jeyes, 5 N. & M. 101.† S. C. 3 A. & E. 416.† See tits. "County," (Treasurer), "Office." (Ministerial Inferior).

(*x*) R. v. Nottingham Old Waterworks, 6 A. & E. 355.† S. C. 1 N. & P. 480.† See ante, pp. 18—23.

(*y*) R. v. London Railway, 15 L. J., N. S. 42, Q. B. S. C. 3 D. & L. 399.

(*z*) R. v. Martin, 1 D. & M. 386. S. C. 2 Q. B. 1037,† n. (*a*). See tit. "Quarter Sessions," (Justices). As to the indemnity for any act done under the authority of a mandamus, see stat. 6 & 7 Vict. c. 67, s. 3, App.

(*a*) R. v. Hants (J.), 1 B. & Ad. 654, 658.† See tits. "Conviction," "Courts Inferior," (Judgment, Execution, &c.)

(*b*) See ante, p. 27. R. v. Clark, 1 D. & M. 687. S. C. 5 Q. B. 887,† it was said in this case, that it was not clear that a mandamus would be the proper remedy. R. v. London Railway, 15 L. J., N. S. 42, Q. B. S. C. 3 D. & L. 399.

(*c*) Estwick's case, Sty. 32, cited in Stamp's case, Raym. 12; 2 Roll. 456, l. 35; Com. Dig. tit "Man." (A). And see stats. 11 Geo. 1, c. 4, and 1 Vict. c. 78, s. 26, App.

which concerns public government ;(d) but the officer has no freehold in his office as an alderman has.(c)

This subject is arranged as follows :—

COUNCILMAN, &c.	COUNCILMAN, &c.—Duties, &c.	
Election - - - -	Return - - - -	101
Admission - - - -	Restoration - - - -	101
Returns - - - -	Form of Writ - - - -	101
Admission and swearing in -	Returns - - - -	101
Returns - - - -	Removal - - - -	102

—] *Election*.—The writ lies to command the holding of a general assembly of aldermen and common councilmen, to proceed to their election in pursuance of an act of Parliament or charter.(f) But not if there be no vacancy or a disputed one, or the office be *de facto* full upon an election not merely colourable. Thus, where a town councillor, elected under stat. 5 & 6 Wm. 4, c. 76, had had, during his term of office, his name expunged from the burgess roll by the overseers, for alleged nonpayment of rates, but continued to exercise his office; the Court refused, on affidavit of those facts, and of the alleged default, to issue a mandamus to the mayor or aldermen of the ward to proceed to a new election, because the vacancy should have been first ascertained and adjudged by judgment on a *quo warranto* information.(g) For where a councillor's name has been thus expunged, *quo warranto* is the only proper mode whereby to try his title to the office, and not a mandamus to command the mayor to hold a fresh election.(h) But if a councillor be ousted, and another elected in his stead, and such election be merely colourable, and therefore void, the Court will grant a mandamus to permit the ousted party to exercise his office, but not [*100] *to restore him to it. But if such ouster and election be *bona fide*, the Court will not grant a mandamus in favour of the party displaced, the proper proceeding being, as before stated, by *quo warranto* against the party holding the office *de facto*.(i)

(d) *R. v. Physicians (College)*, 2 Show. 178, per Pemberton, C. J. See tit. "Office, (Public)."

(e) 5 Mod. 11, per Eyre, J. See tits. "Alderman Office," (Freehold).

(f) See ante, p. 11. *R. v. Chester (Mayor)*, 1 M. & S. 101. See *R. v. Salway*, 9 B. & C. 432, 435.† *R. v. Phippen*, 7 A. & E. 965.† S. C. nom. *R. v. Ricketts*, 3 N. & P. 151. S. C. 2 Jur. 966. See tits. "Corporation Municipal," (Duties, &c.), "Courts Inferior," (Holding, &c.), "Office," (Election).

Before application is made for the writ it would be well, if it be intended to proceed under stat. 6 & 7 Vict. c. 89, App., to see that all the requisitions of such statute have been fully observed.

(g) See ante, pp. 26, 27; 7 A. & E. 966,† supra. *R. v. Oxford (Mayor)*, 6 A. & E. 349.† S. C. 2 N. & P. 474.† *R. v. Winchester (Mayor)*, 7 A. & E. 215.† S. C. 2 N. & P. 274; W. W. & D. 525; 1 Jur. 738. *R. v. Birmingham (Rector of)*, 7 A. & E. 255.† *R. v. Derby (Councillors)*, 7 A. & E. 419.† S. C. 2 N. & P. 589. S. C. W. W. & D. 671. See tits. "Burgess Roll," "Office," (Election.)

(h) *R. v. Ricketts*, 3 N. & P. 151. *R. v. Winchester*, supra. *R. v. Oxford (Mayor)*, 1 N. & P. 474.† S. C. 6 A. & E. 349.† See ante, p. 26.

(i) See ante, p. 26. *R. v. Oxford (Mayor)*, 6 A. & E. 349.† S. C. 1 N. & P. 474.† *R. v. Colchester (Mayor)*, 2 T. R. 259. *R. v. Beedle*, 3 A. & E. 467.† And see 7 A. & E. 257, 421,† supra. See tit. "Office," (Election).

The writ lies, however, to command a town clerk to allow inspection of the voting papers delivered at the election of councillors, under stat. 5 & 6 W. 4, c. 76, and to make extracts therefrom.(j)

—.] *Admission*.—The writ also lies to command an admission into the office of common or town councilman, and to vote therein.(k) But not if there be no vacancy in the office, or a disputed one, or the office is *de facto* full on an election not colourable.(l)

—.] *Returns*.—A return to such a mandamus may traverse all or any of the suggestions for the writ, as that the prosecutor was not a burgess, that he was not eligible to the office of common councilman, that he was not elected, &c. &c.; and such returns have been held out to be inconsistent, and therefore good, if pleaded together.(m) But a return that the prosecutor was not duly elected a common councilman of London, because those who voted for him had not paid the orphan tax in pursuance of stat. 5 & 6 Wm. & M., c. 10, is bad, because a freeman of London is not deprived of his right of voting for a common councilman by not having paid such tax, if it be not demanded of him.(n)

—.] *Admission and Swearing in*.—The writ has also been granted to command the admission and swearing in of a common councilman, duly elected.(o) And also to command the administering of the solemn declaration required by statute, in order to qualify for the office.(p)

—.] *Returns*.—It was formerly held to be a good return to a mandamus to swear in, &c., that the prosecutor had to take the necessary oaths pursuant to stat. 23 Car. 2.(q)

—.] **Duties, &c.*—The writ lies also to command the reception, &c. at a corporate meeting of the council, of the vote of one [101] who has been duly elected councillor, and who is duly qualified for and has accepted such office; and also to permit him in other respects to exercise such office.(r)

(j) R. v. Arnold, 6 N. & M. 152.† See tits. "Accounts," "Books, &c.," "Corporation Municipal," (Inspection), "Manor," (Rolls Inspection), "Vote."

(k) See R. v. Dublin (Dean), Stra. 539, per Eyre, J. R. v. Cambridge (Mayor), 2 T. R. 456. R. v. Winchester (Mayor), 7 A. & E. 215.† S. C. 2 N. & P. 274. R. v. Leeds (Mayor), 7 A. & E. 963.† S. C. 3 N. & P. 145. S. C. 10 L. J., N. S. 112, Q. B.

(l) See ante, p. 26; 7 A. & E. 215,† supra, where see other cases. See supra, Election, and tit. "Office," (Admission).

(m) 2 T. R. 456, supra. See post, tit. "Return," (Traverse).

(n) Warden v. Rous, 7 Mod. 323. See post, tit. "Return," (Certainty).

(o) Anon., 2 Barn. 24. Gay v. Cross, 7 Mod. 37, and cases there cited. Warden v. Rous, 7 Mod. 323. R. v. Love, 12 Mod. 601. Fludier v. Lombe, Cas. t. Hard. 307. Bac. Abr. tit. "Man." (C.) See tits. "Alderman," "Office," (Admission) (Swearing in), "Town Clerk."

(p) R. v. Derby (Councillors), 7 A. & E. 419.† S. C. 2 N. & P. 589. S. C. W. & D. 671. See tit. "College," (Oaths), and post, tit. "Restoration Returns).

(q) 12 Mod. 601, supra. R. v. Slatford, 5 Mod. 317. R. v. Oxford (Mayor), 2 Salk. 429. R. v. St. John's Coll., 4 Mod. 233. See tits. "College," (Oaths), "Office," (Restoration Return Oaths).

(r) R. v. Leeds (Mayor), 11 A. & E. 512;† 5 Jur. 548. And see stats. 11 Geo. 1, c. 4, and 1 Vict. c. 78, s. 26. See tits. "Alderman," (Duties, &c.) "Corporation Municipal," (Duties), "Vote."

So the writ has been granted to command a freeman to take upon himself the office of common councilman, although he had not taken the Sacrament within a year before his election.(s)

—.] *Return*.—A return of a bye-law that persons who refuse to fill the office become subject to the payment of a fine certain, and that the defendant had paid the fine; is bad, if it do not state such payment to be in lieu of service.(t)

—.] *Restoration*.—The writ lies to command a restitution to the office and privileges of a common councilman or councillor, if unlawfully deprived.(u) But if the applicant be merely suspended from his office, the Court will not, it seems, grant a mandamus to restore him.(v)

—.] *Form of writ*.—The restitution of one person only must be sought by the same writ, unless the two or more make but one officer. Thus, in a case where nine were sought to be restored by the same writ, Holt, C. J., in quashing the writ, said, "the amotion of one is not the amotion of another, their interests are several, and they may have been removed for several different causes, one for one fault, and another for another."(w)

—.] *Returns*.—The return of a custom to remove ab libitum is good, because the office of councillor, unlike that of alderman, is merely collateral to the corporation; such custom however must be returned [*102] with certainty.(x) *But a return that the prosecutor had spoken scandalous words of the mayor, &c., is bad, unless the words so spoken had relation to the duty, &c. of such officer: Lord Hale required returns of this nature to be sworn, which was the course pursued in Medlicot's case.(y) So a return that the common councilmen should be

(s) See ante, p. 12. R. v. Walker, 6 M. & S. 277. R. v. Bower, 1 B. & C. 585.† S. C. 2 D. & R. 842.† See tits. "Alderman," (Duties), "Corporation Municipal," (Duties), "Office," (Enforcing Duties.)

(t) 1 B. & C. 585.† S. C. 2 D. & R. 842,† supra. See tits. "Corporation Municipal," (Bye-law), "Return," (Certainty.)

(u) Estwick's case, Sty. 32, (this was a writ of restitution, ante, p. 3). Jaye's case, 1 Vent. 302. S. C. 3 Keb. 714. R. v. Raines, 3 Salk. 233, 234, 16. R. v. Liverpool (Mayor), Burr. 723, approved in R. v. London (Mayor), 2 T. R. 181. Anon., 2 Salk. 436, 19. R. v. Coventry (Mayor), 2 Salk. 430. S. C. Ld. Raym. 391. Bret's case, Comb. 214. R. v. Chester (Mayor) Comb. 307. S. C. 5 Mod. 10. S. C. 3 Salk. 230. S. C. Holt, 438, and cases there cited. Warren's case, 2 Rolle, 112. S. C. Cro. Jac. 540, and cases there cited; also cited in note to Middleton's case in Dyer. 332 b. R. v. Tyther, 2 Keb. 250. William's case, 2 Keb. 558. Earle's case, Carth. 173. R. v. Chichester (Mayor), 1 Show. 273, and cases there cited. R. v. Oxford (Mayor), 6 A. & E. 349.† S. C. 1 N. & P. 474.† See Cowp. 502; 2 T. R. 541, 560. Trem. Pl. Cor. 506, where see form of writ. See tit. "Office," (Restoration).

(v) R. v. Tyther, 2 Keb. 250. But see tit. "Office," (Suspension).

(w) Anon., 2 Salk. 436, 19, and cases cited. R. v. Chester (Mayor), Comb. 308. S. C. 5 Mod. 11. See post, tit. "Writ," (Mandatory Clause).

(x) 2 Salk. 430, supra, and cases there cited. Warren's case, 2 Roll. 112. S. C. Cro. Jac. 540, also cited in note to Middleton's case, 2 Dyer, 332 b. Dighton's case, 1 Vent. 77, 82; 5 Mod. 11, per Eyre, J. See tits. "Alderman," "Custom," "Office," (Will), "Town Clerk."

(y) Jay's case, 1 Vent. 302. S. C. 3 Keb. 714. R. v. Raines, 3 Salk. 233, 16. R. v. Rogers, 2 Salk. 425, 426. See tits. "Alderman," (Restoration Return Libel), "Office," (Restoration Return Libel).

chosen yearly, and that before the coming of the writ they had been so chosen, had continued for a year, and had been afterwards duly amoved from their offices by the election of others, is bad for uncertainty; for it should have shown the time when they were elected, in order that the Court might see that such officers had not been amoved before the year expired.(z)

—.] *Removal*.—The writ does not lie to command a municipal corporation to assemble and consider the propriety of removing certain persons by name from the office of councillor, if there be vested in such corporation a discretionary and not a compulsory power of amotion; because in such case the Court of B. R. has no jurisdiction, unless the corporation be misgoverned.(a)

COUNTY.] This subject is arranged as follows:—

COUNTY.		COUNTY.— <i>Appeal</i>				
Accounts, Books, &c., delivery	102	Treasurer	-	-	-	103
Inspection	-	Election	-	-	-	103
Rate	-	Duties	-	-	-	103

—.] *Accounts, Books, &c., Delivery, &c.*—The writ will be granted to command a county treasurer to deposit with the clerk of the peace, in pursuance of stat. 12 Geo. 2, c. 29, certain books, containing entries of the county expenditure, notwithstanding that the receipts, tradesmen's bills, gaoler's accounts, and copies of the county rate, had previously been deposited with the clerk of the peace, and also that the books contain the discharges of the treasurer and ex-treasurer by the justices in sessions; provided the sessions be party to such illegal detention by the treasurer, by refusing to interfere,(b) because thereby the public are kept from that to which they have a right.

—.] *Inspection, &c.*—The writ has been granted to allow an inspection *of county accounts;(c) but not till after application [*103] for such inspection has been demanded of, and refused by the justices assembled in Quarter Sessions.(d)

(z) R. v. Chester (City), 5 Mod. 10, and cases there cited. See post, tit. "Return," (Certainty).

(a) Ante, p. 12, 13, &c. R. v. Totness (Mayor), 5 D. & R. 481.† R. v. West Loe, 5 D. & R. 414.† And see 4 D. & R. 767. See tits. "Alderman," (Removal), "Office," (Removal).

(b) Ante, p. 27. R. v. Payn, 1 N. & P. 524.† S. C. 6 A. & E. 392.† S. C. W. W. & D. 142; 1 Jur. 54. S. C. 3 P. & D. 623. S. C. 11 A. & E. 955.† See tits. "Accounts," "Books, &c.," "Corporation Municipal," (Insignia), "Manor" (Rolls).

(c) Bac. Abr. tit. "Man." (D). See tits. "Accounts, Books, &c.," "Manor Rolls" and post, tit. "Application." R. v. Nottingham (J.), 3 A. & E. 500.† S. C. 5 N. & M. 161,† citing R. v. Leicester, 7 D. & R. 370.† S. C. 4 B. & C. 891,† but which was much shaken by R. v. St. Marylebone, 6 N. & M. 600,† and overruled by R. v. Staffordsh. (J.), 1 N. & P. 277.† S. C. 6 A. & E. 84,† where see form of writ and return. And see 5 A. & E. 275.†

(d) R. v. Leicester (J.), 7 D. & R. 373,† n.; (a) 7 D. & R. 708.† S. C.

—.] *Rate*.—It would seem that the writ lies to command the making of a county rate; but not to command justices to make a rate to reimburse two of the inhabitants their charges, in defence of an indictment for not repairing a bridge.(*c*)

The writ lies also to command the Court of Quarter Sessions to make an order for a petty constable of a division to levy a certain sum, by rate upon the owners and occupiers of property within the division, liable to be rated for the relief of the poor, for the purpose of reimbursing him the money which he had paid for the proportion of the said division towards the county rate.(*f*)

—.] *Rate, Appeal*.—The writ lies to command the Court of Quarter Sessions to enter continuances and hear an appeal against a county rate.(*g*) So it lies to command a recorder to enter continuances and hear an appeal against a rate in the nature of a county rate.(*h*)

—.] *Treasurer, Election*.—The writ lies to command the Court of Quarter Sessions to elect a county treasurer, both though there be an absolute vacancy, or the office be full by a void election.(*i*)

—.] *Treasurer, Duties, &c.*—The writ of mandamus will not, in general, lie against a county treasurer, as such, both because he is a ministerial officer, the servant of, and amenable to the justices, whose commands he should not resist, and also that the specific legal proceeding applicable to him, on his default, &c., in his official duties, is an indictment, which being the ordinary remedy, must be followed.(*j*) Thus, the writ does not lie to command a county treasurer to pay the keeper of [*104] the *county gaol the salary granted to him by the sessions, the remedy being by indictment.(*k*) This doctrine has been soundly established by a recent case, in which the Court of B. R. refused to direct a county treasurer, by mandamus, to pay a prosecutor's costs, ordered by a Judge of assize, under stat. 7 Geo. 4, c. 64, ss. 23, 24; Lord Denman, in giving judgment, said, that the first question was, whether the Court should interfere by mandamus, "in the case of an inferior officer, amenable to others, and be pointed out that in *R. v. Bristow*, supra, which was also the case of a county treasurer, Lord Kenyon had objected to *descending*

(*c*) Anon. Stra. 63. Com. Dig. tit. "Man." (B.) See tits. "Borough" (Rate), "Church" (Rate), "Highway" (Rate), "Parish" (Rate), "Poor" (Rate).

(*f*) *R. v. West Riding*, 12 East. 116. See tits. "Quarter Sessions," "Constable."

(*g*) *R. v. Middlesex* (J.), 1 P. & D. 402. S. C. 9 A. & E. 540.† S. C. 2 W. W. & H. 100. *R. v. Buckinghamsh.* (J.), 7 B. & C. 3.† *R. v. Westmoreland* (J.), 10 B. & C. 226,† and see 10 B. & C. 792.† *R. v. York* (J.), 2 B. & C. 771.† *R. v. Surrey* (J.), 5 A. & E. 701.† See tit. "Quarter Sessions," (Appeal).

(*h*) *R. v. Stamford* (Recorder), 2 P. & D. 72. See tit. "Recorder."

(*i*) *R. v. Herefordsh.* (J.), 1 Chitt. 700.† See tit. "Office" (Election).

(*j*) Ante, p. 24. *R. v. Payn*, 1 N. & P. 528.† S. C. 6 A. & E. 392.† *R. v. Jeyes*, 5 N. & M. 101.† S. C. 3 A. & E. 416, 422, 424.† S. C. 1 H. & W. 325. *R. v. Shaw*, 5 T. R. 549, which is a very early, if not the earliest, case of a mandamus against a treasurer. *R. v. Bristow*, 6 T. R. 168. *R. v. Surrey* (Treasurer), 1 Chitt. 650.† *R. v. Johnson*, 4 M. & S. 515. See tits. "Newgate," "Office," (Inferior Officer).

(*k*) 6 T. R. 168; 6 A. & E. 397, 400.† S. C. 1 N. & P. 524; 3 A. & E. 419.† S. C. 5 N. & M. 101,† supra.

too low, and put, as an instance, the case of a constable. Littledale, J., in the same case, also pointed out the distinction between “a servant to the magistrates, and a principal, who pays over in his public capacity.”(l) If, also, any public officer refuse to execute any order received by him from his superior, or any competent authority, who, upon such refusal, may punish him by indictment for such disobedience, the Court will not proceed by mandamus against such officer, but leave the applicant to such remedy, not altogether because the officer is too low in degree, but because he has received an order from competent authority, which can enforce a fulfilment of its commands.(m)

Notwithstanding the Court has always refused to place itself in the situation of the magistrates in order to make their officer perform his duty; yet, if both the magistrates and the officer refuse to act, &c., the result of which is, that the public are kept from that to which they have a right, in such case the Court will interfere.(n)

COUNTY COURT.] See tit. *Court, Inferior*.

COUNTY RATE.] See tit. *County (Rate)*.

COURT, INN OF.] See titles *Advocate of Doctors' Commons*; *Inn of Court*.

COURTS.] The Court will not grant the writ to any inferior Court, of competent jurisdiction, where there has been no defect of justice.(o)

*This subject has been thus arranged: First, as to the several Courts Inferior, and what has been required of them; and, Secondly, of Courts Superior. [*105]

1st, COURTS, INFERIOR.	-	-	105	COURTS, INFERIOR.			
Jurisdiction of B. R.	-	-	105	Municipal	-	-	107
List of Courts	-	-	106	Palace	-	-	107
Admiralty	-	-	106	Petty Sessions	-	-	107
Canterbury	-	-	106	Quarter Sessions	-	-	107
Chester	-	-	106	Reading, Court of	-	-	107
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(l) R. v. Jeyes, *supra*.

(m) 6 A. & E. 401,† per Coleridge, J. See tits. “Court, Inferior” (Judgment Execution), “Custos Brevium.”

(n) 6 A. & E. 392.† S. C. 1 N. & P. 524,† *supra*, and see *supra*, “Accounts.”

(o) Ante, p. 10; Gude's Cr. Pr. 180; Anon. 2 Barn. 441. See tits. “Manor” (Leet) “Quarter Sessions,” “Courts, Inferior.”

As to Lis pendens, see ante, p. 23, and tits. “Administration” (Letters), “Churchwarden” (Restoration), “Will” (Return Lis pendens.)

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1st. COURTS INFERIOR.] *Jurisdiction of B. R.*—As the Court of B. R. has general jurisdiction and superintendency over all inferior Courts, whether civil or criminal, so it has the power to compel them to do any act, which by law they should do, whether the obligation arise from a charter, subsist by custom, or be created by act of Parliament: also to command them to execute faithfully all powers with which they are clothed, whenever the same are either denied, or delayed, and to restrain them from intermeddling where they have no jurisdiction.(p) Such a writ does not, however, lie to the Superior Court.(q)

[*106] *Wherever there is a particular jurisdiction, created by act of Parliament, the Court of B. R. may command the execution thereof by mandamus, and remove their proceedings by certiorari, to see whether they have observed their authority;(r) because it is the duty of such Court to correct the errors of inferior jurisdictions, and to grant a mandamus in all cases to which such writ is applicable, in order to prevent a failure of justice, or a public inconvenience by a defect thereof;(s) when it is suspected, on strong grounds, that injustice has been done below;(t) therefore, before the peremptory writ will be granted, manifest injustice must be shewn; thus as that cannot be assigned for error, which is for the advantage of him who seeks to bring it;(u) so in order to support a mandamus, there must be an absolute defect of justice as respects the prosecutor.(v) So the writ will not be granted to command an inferior jurisdiction to

(p) 3 Bl. Com. 110; Bac. Abr. tit. "Man." (D.), (E.); Sty. 7, 8; Lev. 186; Comb. 158, 450. Dr. Walker's case, Cas. t. Ld. Hard. 214. St. Balaunce's case, Palm. 50. S. C. 2 Roll. 106. R. v. Surrey (J.), 2 Barn. 410. R. v. Hewes, 3 A. & E. 730,† per Littledale, J. R. v. Surrey (J.), 2 Show. 74. Brooke v. Ewers, Stra. 113. Eldridge v. Fletcher, 3 D. 588; 1 W. Bl. 640; Stra. 552. See tit. "Portreeve."

(q) Ante, p. 11; Vern. 175; Bac. Abr. tit. "Man." (D.), (E.) See post, "Courts" (Superior), and see tits. "Act of Parliament," "Charters."

(r) R. v. Glamorgansh. (Inhabs.), 12 Mod. 403. See tits. "Act of Parliament," "Commissioners," "Certiorari."

(s) Ante, pp. 10, 11. R. v. Carmarthen (Mayor), 1 M. & S. 696.

(t) See post, tit. "Application." R. v. Cambridge (U.), 6 T. R. 104, per Kenyon, C. J., citing Dr. Bentley's case, 3 A. & E. 730,† supra, per Littledale, J.; Com. Dig. tit. "Man." (A.)

(u) 5 Rep. 39; 2 Saund. 46; 2 Sid. 40.

(v) 6 T. R. 110, supra, per Ashhurst, J.

give effect to or sanction that which, though in part valid, confers a power to commit an illegality.(w)

But though the writ be daily awarded to Judges of inferior Courts, to give judgment, or to proceed in the execution of their authority, yet it is never granted to aid a jurisdiction, but only to enforce the execution of it; for it is not grantable where there is a specific legal remedy.(x) Thus, the writ will not be granted to compel obedience to an order of sessions,(y) because the proper remedy is by indictment.

The following is an *alphabetical list* of the Courts Inferior in respect of which the writ of mandamus has either been granted or denied:—

——.] *Admiralty*.—The Court of B. R. has refused to award a mandamus to the Judge of the Admiralty Court, to grant a monition as to a prize, because it is presumed the Judge will do right.(z)

——.] *Canterbury Corporation*.—See tit. *Attorney*.

——.] *Chester Palatinate*.—See tit. *Attorney*.

——.] *Colchester*.—See tit. *Attorney*.

——.] *County*.—The writ has been granted to command the sheriff to enter a plaint in the County Court, but not a plaint in replevin for damage feasant.(a) So it lies to command it to issue execution on a judgment by default, committed by the defendant, but not after the judgment has been set aside, though not at the instance of the parties, if it were so set aside before the rule for the mandamus was obtained.(b)

*——.] *Delegates*.—The writ does not lie to command the [107] Court of Delegates to admit allegations.(c)

——.] *Ecclesiastical*. See *infra*, *Spiritual*.

——.] *Havering Court, Essex*.—See tit. *Attorney*.

——.] *Lord Mayor's Court*.—It has been held that a mandamus will not lie to command the attorneys and officers of the Lord Mayor's Court in London, to proceed with and dispose of a cause there pending.(d) But it has also been held, that the writ will lie to command the Mayor of London to enter up a judgment upon the Statute for Rebuilding London.(e)

——.] *Manor*.—As to mandamus to the Manor Courts.(f)

——.] *Marshalsea*. See tit. *Attorney*.

(w) Ante, p. 16, n.(n). R. v. Conyers, 15 L. J., N. S. 301, Q. B.

(x) Ante, p. 23; Bac. Abr. tit. "Man." (D.) See tit. "Company" (Execution.)

(y) Ante, p. 24. R. v. Bristow, 6 T. R. 168. See tit. "County" (Treasurer.)

(z) Ante, p. 105. Sayer v. Newton, T., 1 Geo. 2, cited in Dr. Walker's case, Cas. t. Hard. 217. See tit. "Court, Superior" (Queen's Bench). See post, p. 112.

(a) Ex parte Boyle, 2 D. & R. 13, 14.† See *infra*, "Plaint," and see tit. "County."

(b) Eldridge v. Fletcher, 3 D. 588. See *infra*, "Judgment Execution."

(c) Ante, p. 106. St. David (Ep.) v. Lacy, Ld. Raym. 544.

(d) Buxton v. Singleton, 3 Keb. 432. See tit. "Attorney."

(e) Amherst's case, Raym. 214. S. C. 1 Vent. 187. S. C. 2 Keb. 871. R. v. Rushworth, W. Kel. 287. See Stra. 113; Bac. Abr. tit. "Man." (D.) See *infra*, "Judgment Execution."

(f) See 2 D. & R. 176,† n. (a); 1 D. & R. 148,† and 6 T. R. 242; 1 Barn. 59, 68, per Page, J. See tit. "Manor" (Leet Baron).

- .] *Municipal.* See tit. *Corporation Municipal (Duties, &c.)*(g)
- .] *Palace.* See (h).
- .] *Petty Sessions.* See tit. *Quarter Sessions (Petty Sessions).*
- .] *Quarter Sessions.* See tit. *Quarter Sessions.*
- .] *Reading Court.* See tit. *Attorney.*
- .] *Requests.*—The writ lies to command the Court of Requests in

London, to hear and determine a suit instituted in their Court of Requests by the Chamberlain of London, or any other person.(i)

—.] *Requests, Steward.*—But it does not lie to command the late steward of a Court of Requests to pay over the suitors' money received by him in his official capacity, as the money is received to the use of the litigants alone.(j)

—.] *Requests; Clerk, Papers.*—The writ lies, however, to command the delivering up to the clerk of a Court of Requests of all papers, &c. relating to the office, when wrongfully withheld by a person, by reason of his supposed election to the office; so that when two persons are contending for an office, the right to it may always be tried by a mandamus to give up the papers.(k)

—.] *Revising Barrister.* See tit. *Burgess Roll.*

—.] *Saint Martyn-le-Grand.* See tit. *Attorney.*

—.] *Sheriffs.* See titles *Attorney; Bristol; Sheriffs' Court.*

—.] *Southwark Borough Court.* See tit. *Attorney.*

—.] *Spiritual.*—As, where the Spiritual Court adjudicates contrary [*108] to the Common Law, prohibition, de non procedendo lies, so where such Court omits or declines to do that which it ought to do, the Court of B. R. will command it, by mandamus, to do its duty. Thus, if the ordinary will not allow a will to be proved, whereby the legatees are deprived of their legacies, in such case this Court will command him to do justice to the party.(l)

But with matters of purely Ecclesiastical cognizance, or the mere officers of such Court, the Court of B. R. will not interfere by mandamus;(m) there are, however, cases of the writ having been granted in ecclesiastical matters.(n) So, where an act of Parliament creates a temporal duty, and merely saves the jurisdiction of the Ecclesiastical Court,

(g) *Str.* 113; 1 *Vent.* 187. *S. C.* *Raym.* 214. *S. C.* 2 *Keb.* 871; *Cas. t. Hard.* 214; *Com. Dig.* tit. "Man." (A.)

(h) 1 *D. & R.* 527,† and *infra.*

(i) *R. v. Requests (Court).* 7 *East*, 292, where see as to direction of writ.

(j) *R. v. Watson*, 2 *N. & P.* 595.

(k) *R. v. Hopkins*, 4 *P. & D.* 550. *S. C.* 1 *Q. B.* 161.† *S. C.* 10 *L. J.*, *N. S.* 63, *Q. B.*, where see form of writ. See tits. "Accounts, &c.," "Books, &c."

(l) *R. v. Balaunce's case*, *Palm.* 50, 51. *Blackborough v. Davis*, 1 *P. Wms.* 46, per *Holt*, *C. J.* See tits. "Administration, Letters of," "Will."

(m) *Ante*, p. 22. *R. v. Coleridge*, 1 *Chit.* 597,† per *Abbott*, *C. J.* *R. v. St. Margaret's*, 8 *A. & E.* 889.† *S. C.* 1 *P. & D.* 116. *S. C.* 2 *P. & D.* 510. See also tits. "Chureh" (Rate), and "Office" (Spiritual), "Common Pleas."

(n) *R. v. Canterbury (Archbishop)*, 8 *East*, 216. See *R. v. Cambridge (V. C.)*, *Burr.* 1660. See tit. "Bishop."

the Court of B. R. is not thereby excluded from granting the writ, because the Ecclesiastical Court has concurrent jurisdiction.(o)

——.] *Stannaries' Court.* See 2 Keb. 864, per Hale, C. J.

——.] *Stepney Court.* See tit. *Attorney.*

——.] *Thames, Conservancy of.*—The writ does not lie to command the justices of Berkshire to hold a Court of Conservancy, in pursuance of stat. 17 Rich. 2, c. 9, for that part of the river Thames which lies in that county; because as all complaints are, by the statute, to be made to the sessions, such a provision is the prescribed legal remedy for the defect of justice.(p)

——.] *Tolzey Court of Bristol.* See tit. *Bristol.*

As to what has been required of INFERIOR COURTS.

——.] *Holding Courts.*—The writ will be granted to command the holding a Court for the trial of causes, pursuant to charter, act of Parliament, &c. Thus it has commanded the holding of a municipal or borough Court(q) at the instance of an inhabitant of the town, &c., notwithstanding he was not a corporator, and although the holding of such Court had been long disused.(r) It has also been awarded for such purpose, although the Court has not been holden for two hundred years.(s)

——. **Return.*—A return of want of funds to hold the Court [*109] is no valid answer to the writ;(t) but if any good reasons exist why the Court should not be holden, they may be returned.(u)

——.] *Jury.*—As to jury, see tit. *Manor (Leet).*

——.] *Tolt.*—The writ will be granted to oblige an inferior Court to pay obedience to a tolt.(v)

——.] *Plaint.*—So the writ has been granted to command the steward of a manor Court to receive a plaint, and to issue process thereon, and to proceed to the hearing and determination of such plaint, pursuant to a charter, &c.(w)

(o) Ante, p. 11; 8 A. & E. 889, 901.† S. C. 1 P. & D. 116. S. C. 2 P. & D. 519, supra. See tit. "Act of Parliament."

(p) See ante, p. 18. Anon., 2 Barn. 441.

(q) R. v. Wells (Mayor), 4 D. 562. R. v. Hastings (Mayor), 1 D. & R. 148.† 5 B. & A. 692,† (n). S. C. cited in R. v. Eye (Bailiffs), 2 D. & R. 175, 176,† n. (a), and see 10 A. & E. 561;† Bac. Abr. tit. "Man." (D.) R. v. Havering, 5 B. & A. 691. See tits. "Borough," "Corporation" (Municipal), "Manor" (Leet), "Quarter Sessions."

(r) 1 D. & R. 148,† supra; 5 B. & A. 692, (n). R. v. Ilchester (Bailiffs), 2 D. & R. 724.

(s) R. v. Wells (Mayor, &c.), 4 D. 562. In R. v. Hastings (Mayor), 1 D. & R. 148,† a nonuser for fifty-two years was held to be no answer to the writ. So as to a nonuser for thirty years, R. v. Havering, 5 B. & A. 691; Bac. Abr. tit. "Man." (D.) See tit. "Manor" (Leet Plaint).

(t) R. v. Wells, 4 D. 562, supra; 1 D. & R. 148.† S. C. cited in R. v. Eye (Bailiff), 2 D. & R. 175, 176, n.(a) See tits. "Act of Parliament," "Company," "Highway" (Fences), "Railway."

(u) 1 D. & R. 148;† 2 D. & R. 175, 176,† n.(a), supra. See post, tit. "Railway."

(v) Burgh v. Blount, 10 Mod. 350.

(w) Ante, p. 11. R. v. Havering (Steward), E. T., 3 Geo. 4, cited in R. v. Eye

—.] *To proceed, &c.*—So the writ has been granted to command the Judges of a borough Court to proceed with a cause pending in their Court;(*x*) but an application for this purpose must be supported by affidavit, as it will not be presumed that justice is delayed.(*y*)

—.] *Hearing.*—The Court of B. R. will, by mandamus, command all inferior jurisdictions to hear a case in the first instance, or to receive and hear an appeal which they have improperly refused to do, and will oblige them to do whatever is incidentally necessary to such hearing.(*z*) But it will not prescribe the mode of such hearing and determination.(*a*) Thus, a mandamus will be granted to make a rate, but not an equal rate; for in such cases the writ is granted merely to set such jurisdictions in motion when they have refused to act.(*b*) The writ will not, however, be granted to hear and determine, when the tribunal has, in fact, heard and determined, although erroneously.(*c*) So where there is a remedy by appeal, as in the Stannaries' Court,(*d*) the Court of B. R. will not, by mandamus, command a rehearing, because there is not a defect of justice.

—.] *Appeal.* See tit. *Quarter Sessions (Appeal)*.

[*110] —.] **Case.* See titles *Case*; *Quarter Sessions (Case)*; *Poor (Case)*.

—.] *Rehearing.*—Where a tribunal of competent jurisdiction has decided a case, the Court of B. R. cannot, by mandamus, command a rehearing, and will refuse such an application; otherwise it might as well call upon the Lord Chancellor to revise any decision he has made; or upon any other Court to reconsider its judgment.(*e*) So where the practices of a Quarter Sessions required the appellant to begin by proving his case, which the appellant refused to do, whereupon the appeal was dismissed; the Court of B. R. refused a mandamus to rehear on this objection,(*f*) and decided the general principle, that the Court of B. R. will not interfere to regulate the practice of an inferior Court, it being the

(Bailiffs), 2 D. & R. 176, n. (*a*), and citing *R. v. Hastings (Mayor)*, 1 D. & R. 148.† See tits. "Manor" (Leet Complaint), "Quarter Sessions" (Complaint).

(*x*) *Curser v. Smith*, 1 Barn. 59, 68, cited in *Cas. t. Hard.* 215. *R. v. Monmouthsb. (J.)*, 4 B. & C. 846,† and see 1 M. & S. 442; 3 Keb. 432. See tit. "Quarter Sessions" Petty Sessions (Justices).

(*y*) *Curser v. Smith*, 1 Barn. 57. See post, tit. "Application."

(*z*) *R. v. Hewes*, 3 A. & E. 727,† per Patteson, J. *Ex parte Morgan*, 2 Chit. 250.† See also 4 N. & M. 583.† *Doug.* 191, 3 T. R. 504. *R. v. Filntsh. (J.)*, 7 T. R. 200. *Bac. Abr.* tit. "Man." (D.) See tit. "Quarter Sessions" (Hearing).

(*a*) *Supra*, n. (*a*). See post, tits. "Office" (Judicial Officer), "Writ" (Mandatory Clause).

(*b*) 3 A. & E. 732,† *supra*; 9 A. & E. 546.† *R. v. Middlesex (J.)* See tit. "Poor" (Rate).

(*c*) *R. v. Treasury Lords*, 10 A. & E. 179.† *R. v. Treasury Lords*, 10 A. & E. 374.† *R. v. Old Hall (Mayor)*, 10 A. & E. 248.† *Ex parte Smith*, 4 N. & M. 583. S. C. 1 H. & W. 282. See tits. "Quarter Sessions," "Compensation" (Office),

(*d*) *Ante*, p. 10, 21. *R. v. Apleford*, 2 Keb. 864, per Hale, C. J.

(*e*) 3 A. & E. 722,† per Denman, C. J., and Patteson, J.; and see 4 B. & C. 846;† 1 M. & S. 442; and 3 Keb. 432. *R. v. The Eastern Counties Railway*, 2 D., N. S. 948. See tit. "Quarter Sessions" (Rehearing).

(*f*) *R. v. Suffolk (J.)*, 6 M. & S. 57, and see *R. v. Monmouthsh. (J.)*, 1 B. & Ad. 897.† See tit. "Quarter Sessions" (Appeal).

sole judge of its own practice ;(g) but where the practice of an inferior Court is contrary to law, the Court of B. R. will not sanction it, and therefore award a mandamus.(h)

—.] *New Trial*.—The Court of B. R. cannot, by mandamus, command an inferior jurisdiction to grant a new trial, although it be alleged that injustice has been done ; for such a command would, in fact, be to try upon affidavits the truth of any alleged irregularity in a judgment of such Court ; besides, if the judgment be erroneous, a writ of error lies.(i)

—.] *Judgment and Execution*.—It is a general rule, that the Court of B. R. will not, by mandamus, enforce the process of an inferior Court, the Judge of which has power to compel obedience to his process.(ii) The writ has, however, been granted to allow an applicant to enter up final judgment, and tax his costs, in a certain plaint duly entered by him in a Manor Court, and to issue a precept or warrant in the nature of a *capias ad satisfaciendum* thereupon ; but such an application will be refused, if the inferior Court had not jurisdiction.(j) So it has been granted to command the Judge of an inferior Court, as the Sheriff's Court of London, to examine and inquire whether a writ of inquiry or judgment was obtained by fraud or surprise, though strictly regular in form ; and if so, to set it aside.(k) So it has been granted to command the Sheriff's Court of London to proceed to judgment in a case before it ;(l) and a return that the judgment is erroneous, *is not good, for it is sufficient that the Court below has come to a judgment upon the principle [*111] that *res judicata pro veritate accipitur*.(m) So the writ lies to command a municipal Court to give judgment on a verdict, though it had granted a new trial, which it had not power to do ; the mandamus in such a case is in the nature of a *procedendo ad iudicium*.(n)

But where, in the Palace Court, a defendant had suffered judgment to go by default, and that Court had refused to allow the plaintiff to sign final judgment, as by law it was contended he might do, the Court of B. R. refused a mandamus, to command the inferior Court to allow final

(g) 2 Chit. 250,† supra ; Bac. Abr. tit. "Man." (D.) See tit. "Quarter Sessions."

(h) See ante, p. 10. R. v. Bettesworth, W. Kel. 156. See tit. "Quarter Sessions" (Appeal).

(i) Ante, p. 23.† Ex parte Morgan, 2 Chit. 250.† Ex parte Smyth, 3 A. & E. 721.† See tit. "Quarter Sessions," infra (Judgment, &c.)

(ii) R. v. Conyers, 15 L. J., N. S. 300, Q. B. Ante, p. 23, 24.

(j) R. x. Danser, 6 T. R. 242. See Curser v. Smith, 1 Barn. 59, 68 ; Andr. 184, per Page, J. R. v. Oxenden, 1 Show. 219. Wilkins v. Mitchell, 3 Salk. 228. S. C. Ld. Raym. 348 ; Bac. Abr. tit. "Man." (D.) There must be an affidavit of the refusal. See tits. "Conviction," "Quarter Sessions" (Judgment).

(k) R. v. Urling, Fort. 198.

(l) Bayley v. Boorne, Stra. 392 ; Andr. 183. R. v. Urling, Fortes. 198. Smith v. Andover (Bailliffs), M., 11 Geo. 1 ; Barn. B. R. 159 ; and see Cas. t. Hard. 214 ; Bac. Abr. tit. "Man." (D.).

(m) R. v. West Riding (J.), 7 T. R. 467. R. v. Old Hall (Manor), 10 A. & E. 256. S. C. 2 P. & D. 518. R. v. Richardson, 1 Wils. 21.

(n) Brooke v. Ewers, Stra. 113 ; And. 183. R. v. Day, Say. 202. Amherst's case, 1 Vent. 187. S. C. Raym. 214. S. C. 2 Keb. 871, also cited, Cas. t. Hard. 214 ; Com Dig. tit. "Man." (A.) See also 2 Chit. 250,† and 4 N. & M. 583 ;† Bac. Abr. tit. "Man." (D.).

judgment to be signed, and left the plaintiff to his writ of error, which was another and a proper remedy in such case.(o) So, in one case, the Court refused to grant a mandamus to an inferior Court to execute a judgment there given, because there lay a writ de executione judicii.(oo) So the writ will not be granted to command an issue of execution on a judgment which has been set aside.(p)

—.] *Review of Judgment.*—The Court of B. R. will not by mandamus, command an inferior jurisdiction to review a judgment actually signed.(q)

—.] *Records, Copies, &c.*—The Court of B. R. will grant a mandamus to make up a record, for the purpose of enabling a party to plead auterfois convict, &c., or for any other proper purpose;(r) and also to give a copy of such record, when made up, to the applicant's attorney, as the prisoner has a right to have the record of the proceedings which were had at Sessions correctly made up, and to make what use of it he can. So that if a prisoner be found guilty at a Sessions irregularly holden, he is entitled to have the record made up according to the fact.(s)

—.] *Alteration.*—The writ lies to command an inferior Court of Civil Jurisdiction to correct its proceedings.(t) But the Court of B. R. will not command an inferior Court of Criminal Jurisdiction to alter its records *in a matter which operates against the subject, &c. Thus [*112] it will not command the alteration of the minutes of a verdict in a criminal case according to the fact, nor cancel an alteration in such minutes on a representation that the verdict was erroneously entered at the trial.(u)

—.] *Application.*—The granting of a mandamus to revise the sentence of another Court, is not of course; nor is it of course to grant it in a doubtful case, where the Court below, assuming it to be a Court of competent jurisdiction, has exercised that jurisdiction and proceeded to sentence, and the applicant has appealed against that sentence, which has been affirmed on such appeal.(v)

(o) Ante, p. 22. R. v. Conygham, 1 D. & R. 529.† S. C. nom. Arden v. Connell, 5 B. & A. 885. Ex parte Morgan, 2 Chit. 250.† See also 4 N. & M. 583.† Supra (New Trial).

(oo) Ante, p. 22. Wilkins v. Mitchell, 2 Salk. 228. S. C. Ld. Raym. 348, and note there, contra, cited in Dr. Walker's case, Cas. t. Hard. 212, 217; and see R. v. Ely, (Ep.) 1 W. Blac. 57. S. C. 1 Wils. 266; 1 Show. 219.

(p) Ante, pp. 26, 27. Eldridge v. Fletcher, 1 H. & W. 199; 3 Bl. Com. 110.

(q) See supra "Judgment Execution, &c." R. v. Monmouthshire (J.), 4 B. & C. 846.† R. v. Leicestershire (J.), 1 M. & S. 442. Buxton v. Singleton, 3 Keb. 432. See 3 A. & E. 722.† See tit. "Quarter Sessions" (Review).

(r) R. v. Middlesex (J.), 5 B. & Ad. 1113.† R. v. Hewes, 3 A. & E. 731,† per Littledale, J., &c. See tits. "Books," &c. "Conviction," "Quarter Sessions" (Records), "Corporation," (Municipal), (Insignia), "Manor," (Leet).

(s) See tits. "Prisoner," "Quarter Sessions" (Records).

(t) Ante, p. 11. R. v. West Riding (J.), 5 Q. B. 1.† S. C. 3 G. & D. 170. S. C. 1 D. & M. 590; and see 3 A. & E. 321.† See tit. "Quarter Sessions," (Records).

(u) 3 A. & E. 725.† supra. See tit. "Quarter Sessions" (Record).

(v) 6 T. R. 110, supra, per Grose, J. See post, tit. "Application."

——. *Form of Writ.*—The writ is always sent in general terms, to do its duty, and must not require such inferior Court to do a specific act in a particular mode.(*w*) Thus it will not be granted to command such inferior jurisdiction to do a particular thing, as to make an alteration in the clerk of the peace's minutes, as the Court of B. R. has no right to interfere, in this respect, with the practice of the Court below.(*x*)

2nd. Of COURTS SUPERIOR.

COURTS.] *Superior, QUEEN'S BENCH.*—Though a mandamus(*y*) may issue out of Chancery to an inferior Court, yet, on a motion to the Lord Keeper to grant a mandatory writ to the Chief Justice of B. R., to command him to sign a bill of exceptions, the Lord Keeper refused it, and observed, that he would not presume but that the Chief Justice of England would do what was just in the case.(*z*)

——.] *COMMON PLEAS, Officers of.*—The Court of B. R. cannot, by mandamus, meddle with the Court of Common Pleas as to its officers, &c., because the course of their Court is the law, and of that they are the Judges, it being one of the superior Courts.(*a*)

——.] *JUDICIAL COMMITTEE OF PRIVY COUNCIL.*—As to a mandamus to the Judicial Committee of the Privy Council, see tit. *Privy Council*.

CROWN.] It is clearly settled, that the writ of mandamus cannot, in any case, be granted against the King or Queen, both because there would be an incongruity in the Sovereign commanding itself, and also, because *disobedience to the writ must be enforced by attachment.(*b*) Neither will the writ lie to command the officers or servants of [*113] the Crown, as such.(*c*) Thus it does not lie to command the Crown or its servants, strictly as such, being the depositories of public money, &c., either to pay over money in its or their possession, in liquidation of legal

(*w*) Ante, p. 109. *R. v. Suffolk (J.)*, 5 N. & M. 141,† per Patteson, J. See post, tit. "Writ" (Mandatory Clause.)

(*x*) *R. v. Hewes*, 3 A. & E. 731,† per Littledale, J., and per Patteson, J., 732. *Blackborough v. Davis*, 1 P. Wms. 46. *R. v. Leicestersh. (J.)*, 1 M. & S. 444. Ex parte Morgan, 2 Chit. 250;† and see 4 N. & M. 583.† *R. v. Suffolk (J.)*, 6 M. & S. 57; and see *R. v. Monmouthsh. (J.)*, 1 B. & Ad. 897.† See tit. "Office" (Judicial).

(*y*) Ante, p. 1, n. (*a*).

(*z*) *Rioters case*, 1 Vern. 175. See supra, tit. "Admiralty Court."

(*a*) Adm. in *R. v. Oxenden*, 1 Show. 218. See tits. "Proctor," "Office" (Officers of Courts Inferior). Ante, p. 105.

(*b*) *R. v. Treasury (Lords)*, 4 A. & E. 286, 295.† *R. v. Powell*, 4 P. & D. 719. S. C. 1 Q. B. 352.† See tit. "Treasury Lords," and post, tit. "Application."

(*c*) 4 A. & E. 286, 295,† supra. In *re De Bode*, 6 D. 776. S. C. 1 W. W. & H. 332.

and valid claims ;(*d*) or to deliver up goods wrongfully detained.(*e*) Nor does the writ lie to command the steward of a royal manor to admit a tenant, though such steward may have received his appointment from the Commissioners of Woods and Forests, under stat. 10 Geo. 4, c. 50, s. 14; for such statute does not divest the Crown of its legal estate.(*f*)

CURACY.] See tit. Curate.

CURATE.] The writ lies for a curate.(*g*)

This subject has been arranged as follows:—

CURATE	-	-	-	113	CURATE.				
Admission	-	-	-	113	PERPETUAL CURACY	-	-	-	114
Licensing	-	-	-	113	Nomination	-	-	-	114
Restoration	-	-	-	113	Admission	-	-	-	114
AUGMENTED CURACY	-	-	-	114	STIPENDIARY CURACY	-	-	-	114
License	-	-	-	114	Nomination, &c.	-	-	-	114

——.] *Admission*.—The writ lies to command the admission of a curate to his chapel.(*h*)

——.] *Licensing*.—As to licensing a curate, see tit. Lectureship.(*i*)

——.] *Restoration*.—As mandamus is the most proper and effectual remedy to restore a curate to his chapel, in which he has a temporal right, therefore the Court will award the writ for that purpose.(*j*) By it the right to officiate in chapels, whether it depend on nomination or election, can alone be tried; for chapels were not objects of attention in the days when the register was formed, and therefore there is no particular remedy *provided as to them. Thus the writ has been granted to restore the curate of a chapel, being a donative, endowed with lands, he having been appointed, licensed, and in possession, but afterwards turned out by force ;(*k*) there being no other legal remedy, applicable to such a case, for neither ejectionment nor trespass (assuming a curate has the legal property in his curacy and can bring these actions) would be a specific

(*d*) 4 A. & E. 286, 295,† supra. S. C. 6 D. 776.† S. C. 1 W. W. & H. 332.

(*e*) R. v. Customs (Commrs.), 6 N. & M. 828.† S. C. 5 A. & E. 380.† See tit. "Customs."

(*f*) R. v. Powell, 4 P. & D. 719. S. C. 1 Q. B. 352.† See tit. "Manor," (Royal Manor.)

(*g*) It has, however, been refused to command the licensing of a second curate, although it was shown that one was not sufficient, &c., the Court, in its judgment, said that there did not appear to be any such office as a second curate; that there was no trace of any such office in the books, and that the Court could not grant a mandamus for an office in fieri. Anon. 2 Chit. 253.† Bac. Abr. tit. "Man." (C.) See tit. "Office" (Known to the Law).

(*h*) R. v. Barker, Burr. 1268, per Ld. Mansfield, C. J. See tits. "Dissenters," "Office" (Admission).

(*i*) 7 East. 345; 1 T. R. 396; 7 East, 600; Bac. Abr. tit. "Man." (C). See tit. "License."

(*j*) R. v. Barker, 1 W. Blac. 299, 352. S. C. Burr. 1265, 1267. R. v. Bloomer, Burr. 1043, also cited in R. v. Chester (Ep.), 1 T. R. 396, and in R. v. Stafford (Marquis), 3 T. R. 650. Bac. Abr. tit. "Man." (C). See tit. "Dissenters."

(*k*) Burr. 1044, 1047, supra.

legal remedy to restore him to his pulpit, and quiet him in the exercise of his function and office.(l) So the Court will grant a mandamus to command the restoration of the possession of a chapel or of a meeting-house(m); but not of a parochial church, because, there exists another specific legal remedy, viz. by quare impedit.(n)

—.] *Augmented Curacy, License.*—The Court will not grant a mandamus to command a bishop to license the curate of an augmented curacy, where there is a cross nomination, because in such case the party has another specific legal remedy, viz. by quare impedit.(o) The Court has intimated, that the next rule obtained for this purpose without foundation will be dismissed with costs.(p)

—.] *Perpetual Curacy.*—The Court will interfere by mandamus in the cases of perpetual curates.(q)

—.] *Nomination.*—The writ lies to command churchwardens to call a meeting of their parishioners, in order to nominate one to the bishop, in order to be licensed by him as a perpetual curate of a curacy; and that the churchwardens should join in such nomination.(r)

—.] *Admission.*—But with regard to admission, if a quare impedit lie, then a mandamus does not; for no case is proper for a mandamus, but when there is no other specific legal remedy.(s)

—.] *Stipendiary Curacy, Nomination, &c.*—The writ lies to command the presentment to the ordinary of the nomination and appointment of a stipendiary curate, in order that he may obtain a license from such ordinary.(t) But not if there be another specific legal remedy, either in equity or law, as by quare impedit.(u)

CUSTOM.] **Presentment.*—This writ lies to command the tenants of a manor to present a manorial custom.(v) [*115]

(l) Ante, pp. 20, 21; Burr. 1044, 1047, supra. Com. Dig. tit. "Man." (A.)

(m) 1 W. Blac. 300, 352. S. C. Burr. 1265, supra. See tits. "Chapel," "Dissenters."

(n) Ante, p. 26. R. v. Cambridge (U.), 1 W. Blac. 551. S. C. Burr. 1647. See tit. "Parson."

(o) Ante, p. 26. R. v. Chester (Ep.), 1 T. R. 396. R. v. St. Peter, 12 A. & E. 526.† Clarke v. Sarum (Ep.), Stra. 1082, n. (1), 3rd edit.† *Bowell v. Milbank*, 1 T. R. 399, n. (d), per Mansfield, C. J. R. v. Chester (Ep.), 1 W. Blac. 25, n. (o). And see Anon., 1 Dyer, 48, pl. 17, as to quare impedit by a party having the nomination.

(p) 1 T. R. 396, supra. R. v. Canterbury (Archbp.), 15 East, 159. See post, tit. "Costs."

(q) See R. v. Canterbury (Archbp.), 15 East, 132. R. v. Safford (Marquis), 3 T. R. 646.

(r) *Faulkner v. Elger and Another*, 6 D. & R. 518.† See tit. "Churchwarden."

(s) Ante p. 26. *Bowell v. Milbank*, 1 T. R. 399, n. (d), per Lord Mansfield, C. J. R. v. Chester (Ep.), 1 W. Blac. 25 n. (o). R. v. Chester (Ep.), 1 T. R. 396. *Clarke v. Sarum* (Ep.), Stra. 1082, n. (1), 3rd edit.

(t) R. v. Stafford (Marquis). 3 T. R. 646. R. v. St. Peter, 12 A. & E. 526.† See tits. "Lectureship," "License."

(u) Ante, pp. 18—26; 3 T. R. 646, supra. R. v. Chester (Ep.), 1 T. R. 396. And see 1 W. Blac. 22. S. C. 1 Wils. 206. See tit. "Application."

(v) R. v. Montacute (Ld.), 1 W. Blac. 60. S. C. 1 Wils. 283. See tit. "Manor." See 1 B. & C. 565,† for return of such a custom. See tits. "Manor," (Custom License), "Presentment."

—.] *Enforcing Observance.*—As on the one hand the writ lies to enforce a legal custom, *(w)* so on the other hand the Court will not grant the writ to command the doing of an act in opposition to a long continued usage. *(x)*

Where an application is made for a mandamus, and the question turns upon a custom, the existence of which the parties litigant desire to have tried, the Court will either grant the writ for that purpose, or direct an issue. *(y)*

As to the certainty in stating a custom in a return. *(z)*

CUSTOMS.] Duties of Commissioners.—The writ does not lie to command the Commissioners of Customs, &c., although they act wrongfully by withholding goods, or by the doing of any other tortious act; for, to grant a mandamus in such case, would be in effect to grant the writ against the Crown or its officers, which legally cannot be. *(a)* Independently of such objection, the Court will not compel the commissioners to deliver up goods placed rightfully in their custody, to secure the duty, on a suggestion that the full amount thereof has been since tendered or paid, and therefore the goods wrongfully detained; for either the officer is justified or not; if, therefore, he be justified, there is no grievance, but if he be not, a mandamus is not the proper remedy, but an action is. *(b)* The Court has, by mandamus, commanded justices to proceed to judgment on an information of a seizure, under stat. 6 Geo. 1 c. 21. *(c)*

As to registry of ship, see tit. *Ship*.

CUSTOS BREVIIUM.] Clerk, Restoration.—The writ lies not to restore a clerk to his place in the office of the Custos brevium; the Court saying, “that the master of the office is answerable for all his clerks, and hath power over *them, and they are not officers, but mere servants, and therefore there is no remedy to be had in law against him.” *(d)*

CUSTOS ROTULORUM.] See tit. *Peace (Clerk of)*.

(w) R. v. Pickles, 3 Q. B. 599,† n. *(a)*. See tit. “Churchwarden.”

(x) R. v. Chester (Mayor), 1 M. & S. 101; 1 T. R. 423; 2 T. R. 2. See tits. “License,” “Manor,” (License).

(y) R. v. London (Ep.), 1 T. R. 333.

(z) Protector v. Kingston-upon-Thames, Sty. 479, 478, 481; and Waggoner's case there cited. R. v. Coventry (Mayor), 2 Salk. 430. R. v. Pickles, 3 Q. B. 599; *(w)*† and see post, tit. “Return.”

(a) R. v. Customs (Commissioners), 1 N. & P. 536.† S. C. 6 N. & M. 828.† S. C. 5 A. & E. 322,† per Littledale, J.; also cited in R. v. Payn, 6 A. & E. 396.† S. C. 1 N. & P. 524;† 2 H. & W. 247. See tit. “Crown.”

(b) Ante, p. 20. R. v. Customs (Commissioners), 5 A. & E. 322,† per Lord Denman, C. J. S. C. 1 N. & P. 536.† S. C. 2 H. & W. 247. S. C. 6 N. & M. 828;† 2 Selw. N. P. Replevin 1, p. 1184, (ed. 8.) Whitelegg v. Richards, 3 B. & B. 188,† in error. S. C. 2 B. & C. 45;† and see Barry v. Arnaud, 10 A. & E. 656.†

(c) R. v. Tod, Stra. 530. Com. Dig. tit. “Man.” (A.) See tits. “Courts Inferior” (Judgment), “Quarter Sessions” (Judgment).

(d) A Whitechurch v. Paget, Sty. 208. See tits. “County” (Treasurer), “Office,” (Office of Courts).

CUTLER'S COMPANY, COURT OF ASSISTANTS IN.] *Restoration*.—The writ lies to command a restoration of one to be one “in the Court of Assistants of the Company of Cutlers.”(e)

DAMAGES.] See titles *Company*; *Compensation (Assessing)*; *Courts Inferior (Damages)*.

DEAD.] See titles *Burial*; *Corpse*.

DEAN.] The writ lies for the office or function of dean.(f)

—.] *Election, Admission, &c.*—The writ also lies to command the election and admission of a prebendary to be dean.(g) It also lies to elect one a canon residentiary, in order to qualify him for election as dean, and then to elect him into that office.(h)

DEAN AND CHAPTER.] *Clerk, Restoration*.—The Court has denied the writ to restore a clerk of a dean and chapter, for he is not a public officer, his duty being merely to enter leases, &c.(i)

—.] *Register*.—The writ does not lie for the office of register of a dean and chapter, unless there be an affidavit that they have ecclesiastical jurisdiction.(j)

DEAN OF THE ARCHES.] See tit. *Advocate of Doctors' Commons*.

DELEGATES' COURT.] See tit. *Court Inferior (Delegates)*.

DEPOSITIONS.] See titles *Courts Inferior (Records)*; *Prisoner; Quarter Sessions (Records)*.

DEPUTY OFFICER.] See titles *Marches*; *Office (Deputy)*.

*DIGNITY.] *Title, Restoration*.—The writ does not lie to restore one, as a knight, &c., to his dignity, from which he has been degraded by a Court of Honour.[*117](k)

DIRECTORS.] See tit. *Company (Director)*.

(e) R. v. Cutlers' Company, Cas. t. Hard. 129. See tits. “Company,” “Corporation Municipal,” (Franchise), “Franchise,” “Freedom,” “Freeman.”

(f) 44 Ass. 9. Fairchild v. Gair, Brownlow, 201, cited in R. v. Patrick, 2 Keb. 165, per Moreton, J. See tit. “Office” (Ecclesiastical Officer), “Proctor.”

(g) R. v. St. Peter's, 4 P. & D. 252. S. C. 12 A. & E. 512.† See tits. “Office,” (Election Admission), “Prebend.”

(h) 4 P. & D. 253. S. C. 12 A. & E. 512,† supra. See tit. “Canons Residentiary.”

(i) Ante, p. 12. Dean and Chapter's case, Comb. 133. Bac. Abr. tit. “Man.” (C.) See tit. “Office,” (Public).

(j) Ante, p. 12, Comb. 133, supra. R. v. Hill, Show. 203. But see Bollard v. Jerrard, 12 Mod. 609. See tit. “Office.”

(k) R. v. Cambridge (U.), 8 Mod. 149, citing 1 Lev. 119.

DISCRETION.] The writ of mandamus lies to command the exercise of a discretion (*l*)

— *Form of Writ.* Where the object of a writ of mandamus is to enforce the exercise of a “discretion,” the mandatory clause merely, and in general terms, commands such discretion to be exercised. Thus, where a writ commanded the defendants to make such alterations and amendments in certain sewers, as were necessary, in consequence of “the floating of the harbour,” it was held, that such allegation was sufficient, and that it was neither necessary nor proper to call upon the defendants to make any specific alteration, the mode of remedying the evil, being by act of Parliament placed entirely in the discretion of the defendants. (*m*)

— *Return.* If a return of “discretion” be made, it should appear by such return, that the discretion of the right party has been exercised; (*n*) but as, as before stated, the discretion can neither be controlled nor influenced, so in such a return the Court does not require an assignment of the grounds and reasons upon which such discretion is founded; they should not therefore be set out; the return should merely state, that the discretion has been exercised; (*o*) because it is obvious that many matters will and may properly operate in guiding a discretion, which cannot be the subject of proof, and which ought not to be subjected to inquiry. (*p*) But if the grounds, &c. be set forth on the return, and appear insufficient, the Court will quash it. (*q*)

[*118] *DISSENTERS.] This subject is arranged as follows:—

DISSENTERS	-	-	-	-	118	DISSENTERS—Restoration	-	-	-	118
Minister	-	-	-	-	118	Meeting-house	-	-	-	118
Admission	-	-	-	-	118	Registration	-	-	-	118
To qualify, &c.	-	-	-	-	118	Appeal	-	-	-	119

—.] *Minister, Admission.*—Upon this subject Lord Mansfield, C. J., has said, (*r*) “that since the Act of Toleration, the writ of mandamus ought to be extended to protect an endowed pastor of Protestant dissenters, from analogy and the reason of the thing. The right to the function is the substance, and draws after it everything else as appurtenant thereto. The use of the meeting-house and pulpit follow, by necessary consequence, the right to the function of minister, preacher, or pastor; as much as the

(*l*) See ante, p. 12—15, and tits. “Curate,” “Lectureship,” “License.”

(*m*) R. v. Bristol Dock, 6 B. & C. 181.† S. C. 9 D. & R. 309.† R. v. Ouse Bank Commissioners, 3 A. & E. 544.† See post, tit. “Writ” (Mandatory Clause).

(*n*) R. v. Ouse Bank Commissioners, 3 A. & E. 544.†

(*o*) R. v. Canterbury (Archbp.), 15 East. 117. R. v. London (Ep.), 13 East, 419. R. v. London (Mayor), 3 B. & Ad. 255.† R. v. Andover (Burgess), Ld. Raym. 710. R. v. London (Ep.), 13 East, 419. R. v. Gloucester (Ep.), 2 B. & Ad.† 158. See tit. “Return.” R. v. Canton (Overseers), 1 Barn. 299.

(*p*) 2 B. & Ad. 158,† 3 B. & Ad. 268,† supra, and see Ld. Raym. 1244.

(*q*) 3 B. & Ad. 267, 274;† Stra. 115, supra. But see R. v. Canton (Overseers), where the unnecessary setting out of orders, &c., was rejected as surplusage.

(*r*) R. v. Barker, Burr. 1268. S. C. 1 W. Blac. 300, cited in Doe d. Evans v. Jones, 5 M. & R. 755. Bac. Abr. tit. “Man.” C. See tit. “Office.”

insignia do the office of mayor; or the custody of the books, that of a town clerk." Thus it is, that if the minister be duly appointed, and be not admitted, the Court will grant a mandamus to admit him to the use of the pulpit,(s) but not if the establishment be purely a private one.(t)

—,] *to Qualify, &c.*—So the writ has been granted to command the Quarter Sessions to admit one to take the oaths of allegiance, and to subscribe according to the Act of Toleration, in order to be qualified to teach a dissenting congregation.(u)

—,] *Restoration.*—The writ lies to command the trustees of a dissenting meeting-house, as the Particular Baptists, to restore to the office of minister of the congregation, and to the use of the pulpit, if there be an endowment;(v) but the applicant must show that he has complied with all the requisites necessary to give him a prima facie title.(w) But the writ does not lie, as before stated, if the establishment be a private one.(x)

The writ does not lie to oblige a dissenting minister to give security not to become chargeable to the parish, if moved for on behalf of justices.(y)

—,] *Meeting-House; Registration.*—The writ lies to command the Quarter Sessions to register and certify a tenement as a dissenting meeting-house, *pursuant to the Toleration Act, 1 W. & M., st. 1, c. 18; because the duty of the sessions in this particular is purely ministerial;(z) but to such a writ the justices may, it seems, return "not within the qualifications, &c.,"(z) or traverse any material suggestion of the writ.(a)

—,] *Appeal.*—The writ lies to command the entering and hearing of an appeal against a conviction upon stat. 22 Car. 2, c. 1, for keeping a conventicle.(b)

It does not, however, lie to command the justices of a district to suffer a dissenting minister to preach in a particular meeting-house,(c) for a mandamus is always to do some act in execution of law, and has not

(s) Burr. 1265. S. C. 1 W. Blac. 300, supra. Com. Dig. tit. "Man." (A.) T. 25, Geo. 3. Gude's Cr. Pr. 201. See tit. "Institutions," (Private).

(t) R. v. Kendall, 4 P. & D. 603. S. C. 1 Q. B. 366,† cited in R. v. Ottery St. Mary, 3 G. & D. 383. S. C. 4 Q. B. 157, 160,† per Denman, C. J. See tit. "Office." (Public).

(u) Peat's case, 6 Mod. 310. S. C. 6 Mod. 228. S. C. 2 Salk. 572; 1 W. Blac. 300. S. C. Burr. 1265, supra. R. v. Cambridge (U), 8 Mod. 155. Com. Dig. tit. "Man." (A.) Bac. Abr. tit. "Man." (D.) See tits. "Allegiance, Oath of," "College," (Oaths), "Resiant."

(v) R. v. Jotham, 3 T. R. 575; 3 Bl. Com. 110; Bac. Abr. tit. "Man." C. In T. 20 Geo. 3, it was granted to restore the minister of a German Lutheran Chapel; Gude's Cr. Pr. 204. See tit. "Application," post.

(w) Ante, p. 28, 114. See post, tit. "Application."

(x) Note (t) supra.

(y) Peat's case, 6 Mod. 229. S. C. 2 Salk. 572. Ante, p. 27, 28.

(z) Ante, p. 12. R. v. Derbysh. (J.), 1 W. Blac. 605. S. C. Burr. 1991. See also R. v. Green, Skin. 670. Green v. Pope, Ld. Raym. 125. Com. Dig. tit. "Man." (A.). Bac. Abr. tit. "Man." (D.) See tits. "Chapel," "Curate," "Quarter Sessions."

(a) See tits. "Return," "Traverse."

(b) Sand. Obs. upon the Stat. 57, R. v. Southmolton (Mayor). S. C. Skin. 122. Com. Dig. tit. "Man." (A.) See tits. "Conviction," "Quarter Sessions," (Appeal.)

(c) Peat's case, 6 Mod. 229. S. C. 2 Salk. 572.

the same operation as a writ de non molestando,(d) or an injunction in equity.

DISTRESS. It is of very frequent occurrence at the present day, to command justices to grant a warrant of distress in any case in which they properly ought so to do; although formerly the Court used to refuse such applications;(e) and where a remedy by "distress," is expressly given by act of Parliament, it seems that the writ will be granted to command the issuing thereof; notwithstanding there may be a remedy by indictment.(f)

And a justice will be commanded to issue such distress warrant against property of which he is the legal owner. Thus, when upon an application for a mandamus to justices to issue their warrant of distress, to levy a poor-rate, it appeared that the property in respect of which the rate was sought to be obtained, was trust property, left by a testator for the purposes of a free school, and that one of the justices refusing to grant his warrant, was a trustee of the estate, it was held, that notwithstanding his character as such trustee, he was liable to the mandamus.(g)

Wherever there is a remedy by distress, a mandamus will not lie.(g)

DISTRIBUTION OF INTESTATE'S ESTATES.] See tit. *Administration (Distribution)*.

DOCK.] See tit. *Drainage*.(h)

[*120] *DRAINAGE.] This subject is treated as follows:—

DRAINAGE.				DRAINAGE.			
Commissioners of	-	-	120	Rate	-	-	121
Swearing in	-	-	120	Returns	-	-	121
Duties, &c.	-	-	120	Apportionment	-	-	121
Compensation	-	-	120	Books, &c., Inspection	-	-	121
Reimbursement	-	-	120				

—.] *Commissioners.*—It is clear, from several cases, that Commissioners of Sewers are subject to the jurisdiction of the Court of B. R. by writ of mandamus.(i)

(d) Ante, p. 10, and n. (f).

(e) R. v. Bucks (J.), 3 N. & M. 69,† per Littledale, J. See also R. v. Middlesex (J.), 2 Keny. 163. See stat. 6 & 7 Vict. c. 67, s. 3, App., and tits. "Quarter Sessions," (Justices, Warrant).

(f) Ante, p. 21. R. v. Hants (J.), 1 B. & Ad. 658,† R. v. Robinson, Burr. 799, and cases there cited. See tit. "Act of Parliament."

(g) R. v. Ellis, 2 D. 361. See tits. "Quarter Sessions," (Justice), "Poor."

(h) Ante, p. 21. See tit. "Compensation," (Company, Judgment).

(i) 2 Rail. Cas. 599; 6 Jur. 216; 2 Q. B. 64,† S. C. 1 G. & D. 286, where see a form of writ to repair a dock.

(i) Ante, p. 12. R. v. Pagham Levels, 8 B. & C. 357, 358,† Cardiff Bridge case, 1 Salk. 146. S. C. Ld. Raym. 580, and cases there cited. See tits. "Act of Parliament," "Commissioner."

—.] *Swearing in.*—So it lies to command the swearing in of such a commissioner, appointed under a Drainage Act.(j)

—.] *Duties, &c.; Reparation, &c.*—The writ does not lie, at the instance of the Conservators of the Bedford Level, to command the landowners to amend and heighten certain banks within the level which were liable to repair *ratione tenuræ*, and which were alleged, but not admitted to be in a dangerous state; because the stat. 15 Car. 2, c. 17, s. 5, gives the conservators within the level the authority of Commissioners of Sewers, and therefore they have sufficient remedy by amercement, in their own hands.(k) But it lies to command the making of certain alterations and amendments in sewers, &c., under adequate words in a local act.(l)

—.] *Compensation.*—The writ does not lie to command the summoning of a compensation jury, to assess damages for injury done by reason of works *bona fide* erected by Commissioners of Sewers, within the limits of their jurisdiction.(m) But it lies to command commissioners, for putting in execution an act of Parliament for draining, to issue their precept to the sheriff to impanel a compensation jury.(n)

—.] *Reimbursement.*—The writ lies to command commissioners, &c., to reimburse money properly expended in repairing damage done to a sea wall abutting on the prosecutor's lands, but not if it appear by affidavit that the prosecutor has been guilty of laches; as, by allowing the wall after it had *been previously presented for nonrepair, to be [*121] out of repair at the time the accident happened.(o)

—.] *Rate.*—So the writ lies to command Commissioners of Levels, &c. to make a rate to reimburse an expeditor.(p) Thus it has been granted to command such commissioners to make a rate on all persons having or holding messuages, &c. within such level, who had had or might have hurt or disadvantage by inundations of the sea, for want of a sufficient wall there; or who had had or might have benefit by preventing such inundations; and for repaying money advanced by certain persons beyond their proportions of the expenditure in making the new sea wall.(q)

(j) R. v. Kelk, 4 P. & D. 185: 1 G. & D. 127. S. C. 1 Q. B. 660.† S. C. L. J., N. S. 362, Q. B. See tits. "Commissioner," "Office," (Swearing in).

(k) Ante, p. 21. R. v. Gamble, 11 A. & E. 69, 72,† and notes and cases there cited. S. C. 9 L. J., N. S. 2, Q. B. See R. v. Stoke Damerel, 5 A. & E. 584.† S. C. 1 N. & P. 56.† See R. v. Ouse Bank, 3 A. & E. 544.† See post, tit. "Application."

(l) Ante, p. 11. R. v. Bristol Dock, 9 D. & R. 309.† S. C. 6 B. & C. 181,† where see form of writ and return. See tits. "Act of Parliament," "Dock," "Nuisance," &c.

(m) R. v. Pagham Levels, 8 B. & C. 355.† and cases there cited. R. v. Tindall, 6 A. & E. 150.† See tits. "Compensation," (Company), "Jury."

(n) Ante, p. 11. R. v. Nene Outfall, 4 M. & R. 647, and see tits. "Act of Parliament," "Compensation," (Company).

(o) Ante, p. 27, 28. R. v. Essex Commissioners, 1 B. & C. 477.† S. C. 2 D. & R. 700.† See R. v. Capel, 10 A. & E. 404.† See Post, tit. "Application."

(p) Ld. Raym. 1479. S. C. Stra. 763. See tits. "Churchwardens," "Expositor," "Overseers," "Rate."

(q) R. v. Somerset (Commissioners), 9 East, 111, where see a form of writ and

—.] *Returns*.—To such a writ, a return by the commissioners of “tarde,” or that the writ was not delivered until within four days of the expiration of their commission, and that there was no time to make a rate, is a good return. So it is a good return, that they, the commissioners, had made a rate prior to the issuing of the writ, which, when collected, would be sufficient and applicable to repay the prosecutor.(*r*)

—.] *Apportionment*.—So the writ lies to command an apportionment amongst certain parishes of a sum of money, which had been assessed by commissioners under a Drainage Act.(*s*)

—.] *Books, Inspection*.—The writ lies, in some cases, to command inspection and copy, &c., of rate books, plans, &c. But where the Commissioners of Sewers for the Tower Hamlets united two levels which had therefore had separate drains and sewers, and had been separately rated for drainage and sewerage, and then made a joint rate on the united levels; an occupier of property within one of the levels so united, with the object of obtaining evidence in support of a motion to bring up the rate by certiorari and quash it, applied to the commissioners for an inspection of all commissioners’ plans, rates, presentments, decrees, account books, proceedings, and minutes, relating to the Tower Hamlets; but the commissioners merely gave inspection of all documents relating to the rate on the united level. The Court refused a writ to command them to allow inspection of the other documents and proceedings, though the commissioners had given the rate-payers notice of their intention to enforce the rate.(*t*)

4

[*122] DURIAM.] **Freemasons of, Swear, Admit, &c.*—The writ lies to swear and admit into the place and office of a freeman of the Company or Fraternity of Freemasons, &c. of the City of Durham.(*u*)

EAST INDIA COMPANY.] *Duties, &c.*—The writ lies to command the Court of Directors of the East India Company to despatch to the government in council in the East Indies certain orders and instructions, in the form as altered and approved by the Board of Control, if the Board of

return. S. C. 7 East, 70. R. v. Tower Hamlets, 1 B. & Ad. 236, 237.† R. v. Capel, &c., 10 A. & E. 403, 404.† R. v. Hare, 13 East, 188. See *ante*, tit. “Constable.”

(*r*) *Ante*, p. 15; Stra. 763. S. C. Ld. Raym. 1479, *supra*. Com. Dig. tit. “Man.” D. 3. See post, tit. “Return.”

(*s*) R. v. Whitaker, 9 B. & C. 648.† See tits. “Parish,” “Rate.”

(*t*) *Ante*, pp. 16, 27, 28. R. v. Tower Hamlets, 3 G. & D. 92. S. C. 3 Q. B. 670.† S. C. 11 L. J., N. S. 231, Q. B. R. v. Merchant Tailors, 2 B. & Ad. 115.† Burrell v. Nicholson, 3 B. & Ad. 649.† Birmingham Railway v. White, 1 Q. B. 282.† See tits. “Accounts,” “Books, &c.,” “Company,” “Corporation Municipal,” “County,” “Records.”

(*u*) *Ante*, p. 12. Green v. Durham (Mayor), Burr. 127. See tits. “Company,” “Freedom,” (Company Swearing in), “Freeman.”

Control have such right of alteration, &c.(v) And it also lies to command, on the refusal of the directors so to do, notwithstanding the board, by taking the initiative, may itself send out the same despatch.(w)

ECCLESIASTICAL COURT.] See tit. *Courts Inferior*, and ante, p. 22.

EQUITABLE RIGHT.] See tit. *Trust*, and ante, pp. 27, 28.

ETON, PROVOST OF.] *Admission*.—The writ lies to command an admission to the office of Provost of Eton, if duly entitled.(x)

EXCISE.] *Commissioners; Permit*.—The writ lies to command the Commissioners of Excise to grant and issue a permit for the removal of wine, spirits, &c.; if the same ought, as of right, to be granted. But the Court will withhold the writ, if it do not appear that the officer has done wrong in refusing such permit.(y)

—.] *Conviction*.—The writ lies to command the Commissioners of Appeals in Excise Cases, to hear and determine an appeal against a conviction by Commissioners of Excise, as upon an information exhibited for having a private still.(z)

—.] *Judgment, &c*.—So it lies to command the giving of judgment in an excise case.(a)

*—.] *Exportation*.—The writ lies to command a collector of excise to administer an oath, under stat. 38 Geo. 3, c. 54, s. 4, [*123] touching the exportation of goods, in order to obtain a drawback, &c.(b)

—.] *Commissioners of*.—See titles *Admiralty (Lords of)*; *Pension*.

EXCOMMUNICATE.] See tit. *Absolution*.

(v) R. v. East India Company, &c. 4 M. & S. 278, 279. R. v. East India Company, 4 B. & Ad. 530.† S. C. 1 N. & M. 335.† Bac. Abr. tit. "Man." (D). See tits. "Act of Parliament," "Company," (Duties, &c.), "Corporation Municipal," (Duties, &c.)

(w) Ante, p. 21. R. v. East India Company, 4 B. & Ad. 530.† S. C. 1 N. & M. 335.† As to enlarging the rule in order to enter and try an appeal, see 4 M. & S. 279, and the cases, supra.

(x) Ante, p. 12. See R. v. London (Ep.), 1 Wils. 14. See tits. "College," (Provost), "Office," (Admission).

(y) R. v. Excise (Commissioners), 2 T. R. 381, 385. R. v. Excise (Commissioners), 6 Q. B. 975,† and 981, n. (a). As to against whom the writ should issue, S. C. 14 L. J., N. S. 179, Q. B. See tits. "Commissioners," "Customs" (Commissioners).

(z) R. v. Appeals (Commissioners), 3 M. & S. 132. See tits. "Conviction," "Courts Inferior."

(a) R. v. Tod, Stra. 530. Bac. Abr. tit. "Man." (D). See tits. "Courts Inferior," (Judgment), "Judgment," "Quarter Sessions" (Judgment). And see ante, p. 11.

(b) R. v. Cookson, 16 East, 376. See tits. "Allegiance Oath," "Oaths."

EXECUTION.] See ante, p. 23, and titles *Company*; *Courts Inferior* (*Judgment and Execution*); *Judgment*.

EXPENDITOR.] See titles *Drainage* (*Rate*); *Sewers*.

FAVERSHAM.] *Free-fishermen, Restoration*.—The writ lies to command a restoration to the office of freeman of the Company of Free-fishermen and Dredgemen of the Manor and Hundred of Faversham, if improperly removed.(c)

FEES.] See ante, p. 24, and titles *Constable*; *Coroner*; *Lectureship*; *Office*; *Sexton*.

FELLOWS.] See titles *College* (*Fellows*); *University*; *Visitor*.

FISHERY, PRIVATE.] *Appeal*.—The writ lies to command justices to enter continuances and hear an appeal against a record of conviction, under stat. 7 & 8 Geo. 4, c. 29, for having unlawfully angled in a private fishery.(d)

FOOTWAY.] See tit. *Highway*.

FORCIBLE ENTRY AND DETAINER.] The writ lies to command justices to put in execution the statutes of forcible detainer.(e) And also to issue their precept to inquire of a forcible entry.(f) But in a very recent case, the Court of B. R. refused to grant a mandamus to command magistrates to hear a complaint, and act summarily under such statutes-(g) Nor will *the Court compel the granting of a writ of [*124] restitution under stat. 8 Hen. 6, c. 9, for the statute gives a discretionary power.(h)

FOREST LAW.] *License* (i).—See titles *Courts Inferior*; *Lectureship*; *License*.

(c) Ante, p. 12. R. v. Free Fishermen of Faversham, 8 T. R. 352. R. v. Bumstead, 2 B. & Ad. 705.† Adley v. Reeves, 2 M. & S. 53. See tits. "Company," "Franchise," "Freedom," "Office" (Restoration).

(d) Ante, p. 11. R. v. Oxfordsh. (J.), 3 G. & D. 349. S. C. 4 Q. B. 177.† S. C. 12 L. J., N. S. 40, M. C. See tits. "Conviction," "Courts Inferior" (Appeal), "Quarter Sessions" (Appeal).

(e) Ante, p. 11. R. v. Montague, 1 Barn. 72. R. v. Long, 1 Barn. 82. See tit. "Quarter Sessions" (Justices).

(f) Anon., 6 Mod. 139. S. C. 6 Mod. 164. S. C. Holt, 407. Affidavits of the facts must be produced.

(g) Ex parte Davy, 2 D., N. S. 24. S. C. 6 Jur. 24, Wightman, J., saying, in refusing the application, that no case had been cited for it. See ante, p. 11, and tits. "Act of Parliament," "Quarter Sessions" (Justices), and stat. 6 & 7 Vict. c. 73, s. 3, App.

(h) Ante, p. 12, 13. R. v. Harland, 8 A. & E. 826;† and see tit. "Discretion."

(i) R. v. Conyers, 15 L. J., N. S. 300, Q. B., where see a form of writ to an inferior Court to enrol a license.

FRANCHISE.] The writ lies in the cases of franchises of a public nature whether spiritual or temporal.(j) A franchise is in its own nature a freehold, and because it is *juris publici*, the law has a greater regard towards it than any other matter of a private nature.(k) Thus the writ lies to command a meeting of the mayor, &c., to approve a candidate for a franchise.(l) So it lies to command a mayor, &c., who disapproves without cause, to approve and admit him who has a right to be approved and admitted.(m)

—.] *Application.*—The application for an admission to a franchise must shew an inchoate right and title to it, as by apprenticeship, marriage, &c., and thereupon the Court will interfere to aid him, and grant him the writ of mandamus to enforce the completion of his right.(n)

FREE BURGESS.] See tit. *Burgess (Free)*.

FREEDOM.] This subject is arranged as follows:—

FREEDOM.					FREEDOM.				
CITY.					COMPANY.				
Admission	-	-	-	124	Returns	-	-	-	126
Restoration	-	-	-	124	Swearing in	-	-	-	126
COMPANY.					Restoration	-	-	-	126
Admission	-	-	-	125	Return	-	-	-	127
Rule	-	-	-	126					

—.] *City, Admission.*—It is clearly settled, that a mandamus lies to command an inferior jurisdiction or officer to do that, which it is its or his duty to do; as to command the mayor, &c. of a corporation to admit him *who has a right to a freedom, as the freedom [125] of a city.(o) The rule is absolute in the first instance.(p)

(j) Ante, p. 12; 3 Bl. Com. 110. Bagg's case, 11 Rep. 98. Awdley's case, Latch. 123. S. C. Poph. 176. And see stat. 12 Geo. 3, c. 21, App. See tits. "Citizen," "Corporation Municipal" (Franchise), "Freedom," "Freeman."

(k) R. v. Buckingham (Corp.), 10 Mod. 173, 174. See ante, p. 12, n. (n).

(l) Ante, p. 14, 15. Green v. Durham, Burr. 127, where see form of return. Com. Dig. tit. "Man." (A.)

(m) Green v. Durham (Mayor), Burr. 127. Com. Dig. tit. "Man." (A.) See tits. "Lectureship," "License."

(n) R. v. West Looe (Mayor), 5 D. & R. 594, 598.† S. C. 3 B. & C. 677.† R. v. Physicians' Coll., Burr. 2186. See tits. "Burgess" (Admission), "Freedom" (Company), "Freeman," "Office." See post, tit. "Application." And ante, p. 27, 28.

(o) Ante, pp. 11, 12. Roger's case, T. 18 Car. 1; Rot. 23, cited in Dr. Dolbed's case, 1 Keb. 881. S. C. 1 Keb. 872, per Twisden, J. R. v. Eye (Corp.), 1 B. & C. 85.† S. C. 2 D. & R. 172.† R. v. Bosworth, Stra. 1112. R. v. Oakhampton (Mayor), 1 Wils. 332. Townsend's case, 1 Lev. 91. S. C. 1 Sid. 107. S. C. 1 Keb. 458, in which case a precedent of a like mandamus was produced, and a similar one was also stated to have been granted, M. 32 Car. 2, B. R. R. v. Rushworth, Kel. 287. R. v. Harrison, Burr. 1323. S. C. 1 W. Blac. 371. R. v. Lincoln (Mayor), 12 Mod. 190. S. C. Carth. 448. S. C. 5 Mod. 399, 402, where see form of writ. S. C. Ld. Raym. 203, where see a form of writ and return. See stat. 12 Geo. 3, c. 21, App. R. v. Coventry (Mayor), 3 Doug. 236. R. v. Kingston-upon-Hull, 11 Mod. 382. S. C. Stra. 578. See R. v. Osborn, 1 Com. 240. Com. Dig. tit. "Man." (A.) R. v. Ludlam, Stra. 675. S. C. 8 Mod. 267. See tits. "Citizen," "Corporation" (Municipal), "Courts Inferior," "Freeman," "Livery."

(p) R. v. Coventry (Mayor), 3 Doug. 236. See post, tit. "Rule."

—.] *City, Restoration*.—So it lies to restore to priority of freedom.(q)

—.] *Company, Admission*. So the writ lies to command admission to the freedom of a company.(r) Thus the writ lies to command the admission of an Apprentice to his freedom of city or company,(s) and he is entitled to the writ, although he may have committed a breach of the covenants of his apprenticeship deed by marrying, &c. for it is clear that a mere breach of covenant, especially after waiver thereof, does not incur a forfeiture of freedom.(t) The Court of B. R. will also, on a proper case, command all inferior jurisdictions to do all necessary and proper acts for the perfection of the right to admission. Thus a writ of mandamus has been granted to admit to an office for enrolling and entering all indentures of apprenticeship, and the freedoms of such apprentices.(u) So it has often been granted to command the town clerk, steward, or other proper person to enrol indentures of apprenticeship in the public books of a company; if such a proceeding be made necessary by a by-law, &c., in order to obtain a freedom; but the apprenticeship must be such, and the apprentice must have complied with all the rules, as clearly to entitle him to such right.(v)

[*126] *—.] *Rule*.—The rule to admit to the freedom of a city, &c. is absolute in the first instance.(w) The practice being, that where the writ is to swear or to admit, the Court will, in case the right appear plain, grant the writ upon the first motion, that is, absolute in the first instance. But where it is to restore one who has been removed, the practice is to grant a rule nisi only.(x)

—.] *Return*.—A return that applicant would not take the usual oaths before admission, has been held good.(y) But as a Quaker should

(q) Ante, p. 12. *R. v. Trinity Chapel*, 8 Mod. 28. Roll. Abr. 481. *R. v. Canterbury (City)*, 1 Lev. 119. See tit. "Office," (Restoration).

(r) *R. v. Rushworth*, Kel. 287. See tits. "Company" (*Bermuda's Company*), "Cutlers' Company," "Franchise," *Freeman*, "Livery."

(s) *R. v. Lincoln (Mayor)*, 12 Mod. 190. S. C. Carth. 448. S. C. 5 Mod. 399, 402. S. C. Ld. Raym. 203, where see a form of writ and return. See stat. 12 Geo. 3. c. 21. App. *R. v. Selby*, 5 Show. 154. *R. v. Cambridge (Mayor)*, 2 Chit. 144. *R. v. Ludlam*, 8 Mod. 267. S. C. Stra. 675. *R. v. Harrison*, Burr. 1323. Bac. Abr. tit. "Man." (D.)

(t) *Townsend's case*, 1 Lev. 91, a precedent being produced of a similar case at Norwich; a similar writ was also granted; *M. 32 Car. 2, B. R.* S. C. 1 Sid. 107. S. C. Raym. 69. S. C. 1 Keb. 458, 470, 659. *R. v. Selbye*, 2 Show. 154; and see *Green v. Durham (Mayor)*, Burr. 127. Com. Dig. tit. "Man." (A.), sed vide (D.) 4. See tit. "Office," (Restoration Returns).

(u) Ante, p. 11, 12. *R. v. Gravesend (Mayor)*, 2 B. & C. 602.† See tit. "Office."

(v) Ante, p. 27, 28. *R. v. Marshall*, 2 T. R. 2. *R. v. Tappenden*, 3 East, 185, where see form of writ and return. *R. v. Coopers' Company*, 7 T. R. 543, where also see form of writ, &c.

(w) Ante, p. 125. *R. v. Coventry (Mayor)*, 3 Doug. 236.† See post tit. "Rule."

(x) 3 Doug. 236. n. (a). Bull. N. P. 199. See *R. v. Truro (Mayor)*, 2 Chitt. 257,† and cases there cited. See post, tit. "Application."

(y) *Sira*. 1112; 12 Mod. 190. S. C. Carth. 448; Burr. 999. supra. See tits. "College" (Oaths), "Oaths," "Office" (Restoration, Return, Oaths).

be admitted upon making a solemn affirmation merely, instead of the usual statutory oaths,(z) it has been held not to be a good return to say that such a person had not taken the oaths.(a)

—.] *Swearing in, &c.*—So the writ lies to swear and admit into the place and office of a freeman; as of the Company or Fraternity of Freemasons;(b) or Armourers and Braziers;(c) or Scriveners' Company;(d) or Russia Company;(e) or Turkey Company;(f) or Clothmakers' Company;(g) or Joiners' Company;(h) or of the Gunmakers' Company, &c.(i)

But the Court will not interfere on behalf of a person who has not acquired an inchoate right to be admitted(j) by birth, servitude, &c. But if a bye-law of a company make it penal for a man to exercise any other trade but that of the company, he is thereby entitled to his freedom of such company,() in order to avoid the penalty.

—.] *Company, Restoration.*—So the writ lies to restore to the office of freeman, or to the freedom of a company,(l) as the Cutlers' Company, in all cases of illegal deprivation.

—.] **Return.*—And a return to such a mandamus should [*127] state, that the body removing has proved the charge for which the prosecutor was removed. It is not sufficient to state merely that he was present when the charge was made, and did not deny it.(m)

FREEMAN.] This subject is arranged as follows :—

FREEMAN.		FREEMAN— <i>Restoration</i>	-	-	127
Presentation for admission	-	127	Form of writ	-	127
Admission and swearing in	-	127	Return	-	128

—.] *Presentation for Admission.*—The writ lies not to command

(z) Supra, Burr. 999, 1004, 1005. R. v. Lincoln (Mayor), 12 Mod. 190, n. (a). S. C. Carth. 448. S. C. 5 Mod. 399, 402. S. C. Ld. Raym. 203.

(a) R. v. March, P. 33 Geo. 2; Burr. 999; Com. Dig. tit. "Man." D. 4.

(b) Ante, p. 12. Green v. Durham, Burr. 131. Wright v. Fawcett, Burr. 2043, 2044. See a form of direction, Raym. 456, and post, tit. "Writ" (Direction). See tits. "Office" (Swearing in).

(c) Smith v. Armourers' Company, Peake, N. P. Cas. 199.

(d) R. v. Scriveners' Company, 10 B. & C. 511.† S. C. 5 M. & R. 543. See tit. "Scriveners' Company."

(e) De la Costa v. Russia Company, 1 Barn. 24. S. C. Fitz. 4.

(f) R. v. Turkey Company, Burr. 943, 947, where see form of the writ and return (in this case the prosecutor was a Quaker), Bac. Abr. tit. "Man." (D.)

(g) R. v. Harrison, 1 W. Blac. 371. S. C. Burr. 1322. S. C. where see a form of return.

(h) See Burr. 1328, supra.

(i) R. v. Gunmaker's Company, W. Kely. 280.

(j) Ante, pp. 27, 28. R. v. Lincoln's Inn, 7 D. & R. 368,† per Littledale, J.; Com. Dig. tit. "Man." (A.) See tit. "Franchise," "Freeman."

(k) See ante, p. 11. R. v. Ludlam, 8 Mod. 267. S. C. Stra. 675. Robinson v. Grosseourt, 5 Mod. 104. Harrison v. Goodman, Burr. 12; Burr. 1323, supra.

(l) R. v. Whitstable (Freefishers), 7 East, 353. R. v. Faversham (Freefishers), 8 T. R. 352. See tit. "Cutlers' Company," "Office," (Restoration).

(m) 8 T. R. 352, supra. See tits. "Franchise," "Office" (Restoration Return).

the inquiry jury of a borough to present persons to be freemen, although by custom they must be presented by such a jury before they can be admitted by the bailiffs. Holt, C. J., stating that the Court would grant a mandamus to them who are to admit, but not to them who are present upon oath; the truth of a fact; not to a jury; for it is presumed, that a grand inquest will present as they ought, and so of an inquiry jury.(n)

—.] *Admission and Swearing in.*—The writ, however, lies to admit and swear into the place or office of a freeman of a city or borough, under stat. 12 Geo. 3, c. 31.(o)

But the applicant must be duly qualified, that is, have an inchoate right by birth, servitude, &c.(p) And by the stat. 12 Geo. 3, c. 21, any person entitled to be admitted a freeman, who shall apply to the mayor, &c., to be admitted, and also give notice specifying the nature of his claim may, unless admitted within a month, apply to the Court of B. R. for a mandamus for that purpose: if he be refused admittance, and a peremptory mandamus be afterwards granted, the mayor, &c. shall pay the costs.(q)

—.] *Restoration.*—The writ lies also to command the restoration of a freeman of a city, borough, or town, illegally disfranchised.(r)

—.] *Form of writ.*—The writ, as in all cases of franchises, should [*128] *be to re-admit or restore to the "privilege," and not to the "place and office" of freeman.(s)

—.] *Return.*—Although it is undecided whether a burgess having committed an offence indictable at common law, together with a breach of his oath and duty, can be disfranchised previously to conviction of the indictable offence, yet if it appear that an indictment would not have determined the matter, he may be disfranchised for the acts amounting to a breach of his oath and duty.(t)

FREEMASONS OF DURHAM.] See titles *Durham; Freedom (Company, Swearing in).*

(n) Ante, p. 112. Clithero's case, Comb. 239, also cited in R. v. Montacute (Ld.), 1 W. Black. 64. S. C. 1 Wils. 283; and see stat. 9 Ann. c. 20, s. 1. See tits. "Courts" (Superior, Q. B.), "Jury," "Presentment."

(o) See stat. in App. as to notice of application, &c. Green v. Durham (Mayor), Burr. 137. Wright v. Fawcett, Burr. 2941, where see form of writ and returns. R. v. Doncaster (Mayor), 7 B. & C. 630.† R. v. Montacute (Ld.), 1 W. Black. 64. S. C. 1 Wils. 283. R. v. Stafford, 4 T. R. 689. R. v. Norris, 1 Barn. 385. Moore v. Hastings (Mayor), Cas. t. Ld. Hard. 353. R. v. Malmesbury (Alderman), 3 G. & D. 482. S. C. 3 Q. B. 577.† S. C. 11 L. J., N. S. 318, Q. B.; Bac. Abr. tit. "Man." (C.) See tits. "Alderman," (Election), "Citizen," "Franchise," "Freedom" (City), "Office."

(p) Ante, pp. 27, 28. R. v. Montacute (Ld.), 1 Black. 61; 1 Wils. 283. S. C.

(q) See stat. App.; Com. Dig. tit. "Man." (A); but see stat. 6 & 7 Vict. c. 89, s. 5, App. See tits. "Franchise," "Freedom," "Livery," "Office."

(r) Ante, p. 12. The Protector and Kingston-upon-Thames, Sty. 477; this was a writ of restitution; see also R. v. Derby (Mayor), Cas. t. Ld. Hard. 152. See tits. "Company," "Franchise," "Freedom" (Restoration), "Office," (Restoration).

(s) R. v. Morris, Ld. Raym. 338. See post, tit. "Writ," (Mandatory Clause).

(t) See tit. "Burgess." R. v. Derby (Mayor), Cases. t. Hard. 152, and cases there cited, as to disfranchisement; but see tit. "Office," (Restoration, Return).

FRIENDLY SOCIETIES.] *Enrolment, &c.*—The Court of B. R. will, by mandamus, command justices at Quarter Sessions to enrol and confirm the rules of a friendly society. But as the authority of such justices, under the stat. 10 Geo. 4, c. 6, to inquire whether the tables of payments and benefits in friendly societies can safely be adopted, does not extend to societies instituted before the passing of that act, the Court will not command the enrolment of the rules, &c. of such a society.(u)

So it seems the Court will grant the writ to annul and make void all rules, &c., that are repugnant to the stat. 33 Geo. 3, c. 54, and to allow and confirm all such of them as are conformable thereto.(v)

—.] *Complaint.*—The writ also lies to command justices to issue their summons to a friendly society, to hear and determine a complaint as to an expulsion from such society, and to make an order thereupon.(w) But the Court has refused to grant such a mandamus for a society which had been acting on rules not enrolled for upwards of thirty years, on the doubt the Court entertained as to the existence of the society, although the originally enrolled rules had never been repealed.(x) The writ also lies to command justices to proceed to hear and determine a complaint of a friendly society against a member, for not paying a sum of money, pursuant to the stats. 10 Geo. 4, c. 56, and 4 & 5 Wm. 4, c. 40.(y)

GAME LAWS.] *Conviction; Appeal.*—The writ lies to command justices *at Quarter Sessions to enter continuances, and hear an ap- [*129] peal against an order of conviction under stat. 52 Geo. 3, c. 93, Sched. L. R. 12, of the said act, for using a greyhound for the purpose of killing a hare; without having taken out a certificate.(z) But the Court will not command them to rehear an appeal, on the ground that they rejected admissible evidence, although an appeal be against a conviction under an act, by which a certiorari is taken away.(a)

GAMING.] *Conviction; Appeal.*—The writ lies to command the

(u) R. v. Somerset (J.), 1 N. & M. 252.† See tits. "Act of Parliament," "Quarter Sessions" (Justices).

(v) R. v. Staffordsh. (J.), 12 East, 280.

(w) R. v. Godolphin (Ld.), 3 N. & P. 488. S. C. 8 A. & E. 338.† "Quarter Sessions" (Justices).

(x) Ante, p. 10, 11. R. v. Godolphin (Ld.), supra. R. v. Gilkes, 8 B. & C. 439.† S. C. 2 M. & R. 454. Ex parte Morrish, Jac. Rep. 162. R. v. Witham Savings' Bank, 3 N. & M. 416.† S. C. 1 A. & E. 321.† Battey v. Townrow, 4 Camp. 5. But see now indemnity clause in stat. 6 & 7 Vict. c. 67, s. 3, App., and tit. "Quarter Sessions" (Justices).

(y) R. v. Shortridge, 1 D. & L. 855. S. C. 13 L. J., N. S. 70, M. C., nom. R. v. Scott. The rule was drawn up upon notice of such rule to be given to such defaulter.

(z) R. v. Salop (J.), 2 B. & A. 694.† Ex parte Pratt, 2 N. & P. 102. See tits. "Act of Parliament," "Conviction," "Quarter Sessions" (Appeal).

(a) Ex parte Pratt, 2 N. & P. 102. See tits. "Certiorari," "Conviction," "Quarter Sessions" (Rehearing).

Quarter Sessions to enter continuances and hear an appeal against a conviction for gaming, under stat. 12 Geo. 2, c. 28 (b).

GAOL.] The writ lies to command justices to take into consideration the report of a prison visiting justice respecting certain abuses in a house of correction, and to take measures for rectifying the same.(c)

As to the delivery up by gaoler of the corpse of a late prisoner, see tit. *Corpse*.

GUARDIANS OF THE POOR.] This subject is arranged as follows :

GUARDIANS OF POOR.					GUARDIANS OF POOR.				
Election	-	-	-	129	Appointment	-	-	129	
Duties, &c.	-	-	-	129	Admission	-	-	130	
Clerk to Guardians	-	-	-	129	Restoration	-	-	130	

—.] *Election*.—The writ lies to command a borough corporation to hold an assembly for the purpose of electing guardians of the poor, under the provisions of a local act.(d) So it has been granted to command churchwardens to set aside a certain election of guardians, and to hold a vestry for the purpose of electing four persons to be such guardians, and to proceed in their election.(e)

—.] *Duties, &c.*—See titles *Alderman (Duties)*; *Church (Church Trustees)*; *Office*; *Poor (Poor Law Commissioners)*.

—.] *Clerk, Appointment*.—It is doubtful, upon the authorities, whether the appointment of clerk to a board of guardians of the poor, be or be not an office for which a mandamus will lie; whether it be so or not, depends entirely upon the nature of the appointment in each particular case.

*So that when an application as to such an office is made, the instrument instituting it should be brought before the Court.(f) If the appointment should be general, it will not be construed *quandiu se bene gesserit*; it not being a corporate office; for the Court will look to the nature of the office, which, generally, it would be inconvenient to consider as a permanent one.(g)

—.] *Clerk, Admission*.—In one case, the question whether a mandamus would lie to command an admission to such office, and to permit the performance of the duties thereof? was raised, but not settled; the

(b) *R. v. Surrey (J.)*, 5 B. & A. 539. S. C. 1 D. & R. 160.† See tits. "Conviction," "Quarter Sessions" (Appeal).

(c) *R. v. North Riding (J.)*, 3 D. & R. 510.† S. C. 2 B. & C. 286.† See tits. "Newgate," "Quarter Sessions" (Justices), "Prisoner." But see tit. "Presentment."

(d) Ante, p. 11. *R. v. Norwich (Mayor)*, 1 B. & Ad. 311.† See tits. "Act of Parliament," "Churchwarden," "Corporation Municipal."

(e) *R. v. Clerkenwell (Churchwardens)*, 3 N. & M. 411.† See tit. "Office" (Election).

(f) *R. v. Dolgelly Union*, 8 A. & E. 561.† S. C. 3 N. & P. 542. See *R. v. St. Nicholas (Guardians)*, 4 M. & S. 324. See tits. "Office" and post "Application."

(g) *R. v. St. Nicholas*, supra.

Court having refused the writ upon the ground, that it cannot be granted at the instance of an applicant who complains that the person filling the office had been unduly elected; because it was effected by the votes of guardians who were themselves not properly elected.(h)

—.] *Restoration*.—It has been, however, expressly decided, that the writ lies not to restore to the office of clerk and treasurer of the guardians of the poor of a parish, as of the parish of St. Nicholas, Rochester, notwithstanding he may be denominated an officer by stat. 49 Geo. 3, c. 40, and his place, an office; for he is only the servant of a fugitive body, viz., the parish officers, and his appointment is no more permanent than theirs.(i)

GUILDFORD, APPROVED MEN OF.] *Restoration*.—The writ lies to restore to the place of one of the Approved Men of Guildford.(j)

GUNMAKERS' COMPANY.] *Approver of Guns, Restoration*.—The writ lies not to command a restoration to the place of approver of guns, because the public is in no way concerned, nor is there any public law for it, but on the contrary, it is of a private nature.(k)

As to admission, &c. to the Gunmakers' Company, see titles *Company*; *Franchise*; *Freedom (Company)*.

HALF-PAY.—The writ does not lie to command the Lords of the Admiralty to pay deductions from an officer's half-pay, nor even the half-pay itself, nor the arrears, there being no legal right to any one of them, each being, in fact, a mere voluntary donation.(l)

*HAVERING COURT.] See tit. *Courts Inferior*. [*131]

HEARING.] See titles *Courts Inferior*; *Quarter Sessions (Hearing)*.

HEDGES.] See tit. *Highway (Fences, Walls, Hedges, &c.)*

HIGH CONSTABLE.] See tit. *Constable (High Constable)*.

(h) 4 B. & A. 496. R. v. Dolgelly Union, 3 N. & P. 542. S. C. 8 A. & E. 561; † 2 H. & W. 513. See tits. "Burgess" (Chief), "Office" (Admission).

(i) R. v. St. Nicholas (Guardians), 4 M. & S. 324. But see 8 A. & E. 561. † S. C. 3 N. & P. 542, *supra*. See tit. "Office."

(j) Mills' case, Raym. 152. S. C. 1 Lev. 162, nom. R. v. Guildford (Approved Men of). S. C. 1 Keb. 868, 880. S. C. 2 Keb. 1. And see R. v. Exeter (Dean), 2 Show. 217, n. (a). See tit. "Ashburton" (Eight Men of). As to description, &c., of office, see tits. "Office," "Tiverton" (Twenty-four Men of).

(k) Vaughan v. Gunmakers' Company, 6 Mod. 82. S. C. Ld. Raym. 989; also cited in R. v. Morpeth (Ball), Stra. 59. Bac. Abr. tit. "Man." C., *sed qu.* See tit. "Office" (Public).

(l) See ante, p. 27, 28. Ex parte Ricketts, 4 A. & E. 999. † S. C. 6 N. & M. 523. † Flarty v. Odum. And see 4 A. & E. 995, † n. (e). See tits. "Admiralty" (Lords of), "Pension," "Treasury" (Lords of).

HIGHWAY.] This subject is arranged as follows:—

HIGHWAY.				HIGHWAY.			
Setting out, &c.	-	-	131	Appointment	-	-	135
Fences, walls, &c.	-	-	131	Swearing in	-	-	135
Statute duty	-	-	132	Accounts	-	-	135
Repairs	-	-	132	Reimbursement	-	-	135
Obstruction	-	-	133	Books, Delivery, &c.	-	-	136
Compensation	-	-	133	Inspection	-	-	136
Diverting, stopping up, &c.	-	-	133	Clerk.			
Toll-gates, Tolls, &c.	-	-	134	Admission	-	-	136
Rate	-	-	134	Restoration	-	-	136
Surveyors	-	-	135	Miscellaneous matter	-	-	136

—.] *Setting out, Making, &c.*—The writ will be granted to command inclosure commissioners under a local and personal act, to set out a road as a public one; and a power to proceed by indictment against the commissioners, for not obeying an order of sessions directing them to set out the road as a public road, is not such a remedy as will determine the Court not to grant the writ.(*m*) So the writ lies to command a railway or other company to make a road, pursuant to their act;(n) or to excavate or widen a road,(o) notwithstanding the road made be more commodious than that directed by such act.(o)

—.] *Fences, Walls, Hedges, &c.*—The writ lies to command the trustees for making a turnpike road through private grounds, to make proper fences, as required by stat. 4 Geo. 4, c. 95, s. 66, and a return of the want of necessary funds for that purpose, is no answer to such a writ.(p) So it lies to command district road trustees to repair a wall on the road side, but their liability must be clearly shewn.(q) Thus, although [*132] trustees under a *road act, turn a road through an inclosure, and make the fences at their own expense, and repair them for several years; yet the Court will not compel them, by mandamus, to continue such repairs, unless there be a special provision in the act to that effect.(r)

So the writ has been granted to command the reparation of hedges.(s) So it has been granted to command justices to issue their warrant in order

(*m*) Ante, p. 24. Anon., Loft, 189. R. v. Dean Inclosure, 2 M. & S. 79. R. v. Jeyes, 3 A. & E. 420.† R. v. West Riding (J.), 2 B. & C. 229.† R. v. Severn Railway Company, 2 B. & A. 649. See tits. "Act of Parliament," "Drainage," "Inclosure."

(*n*) Ante, p. 11. R. v. Birmingham Railway, 1 G. & D. 324. S. C. 2 Q. B. 47,† where see form of such a mandamus. S. C. 2 Rail. Cas. 694. R. v. Bristol Railway, 12 L. J., N. S. 106. Q. B. See tits. "Company," "Railway."

(*o*) R. v. Manchester Railway, 1 G. & D. 338, where see form of writ.

(*p*) R. v. Luton Roads, 1 G. & D. 248. S. C. 1 Q. B. 869.† And see R. v. Eastern Counties Railway, 4 P. & D. 46. See tits. "Courts Inferior" (Holding Court, Return).

(*q*) See ante, p. 29. R. v. Llandillo Roads, 2 T. R. 232; and see 12 A. & E. 428.† S. C. 4 P. & D. 154. But see infra, "Repairs." and post, tit. "Application."

(*r*) Ante, p. 15; 2 T. R. 232, supra.

(*s*) Anon., Comb. 257, citing Sty., but Eyre, J., said he did not see how it lay for hedges.

to levy the expenses of cutting a hedge, by the surveyors of highways, pursuant to stat. 5 & 6 Wm. 4, c. 50, s. 65; but not unless it appear by the affidavits in support of the rule, that a demand has been made of the expenses, from the persons sought to be charged, and the justices were informed of that demand.^(t)

—.] *Statute Duty*.—The writ lies to command justices to receive and determine an appeal by the surveyors of the highways, against a conviction for not having delivered in, pursuant to notice, to the trustees of a turnpike road, under stat. 17 Geo. 3, c. 106, a list, in writing, of the inhabitants, &c. in the said township, liable to do statute duty; but not unless the appeal be properly entered.^(u) So it lies to command justices to compel the performance of statute duty by those whose duty it is to do it;^(v) or to command them to enter continuances, and hear the appeal of a road surveyor against an order of justices, for the performance of statute work, and for the payment to the treasurer of a turnpike act, of a certain sum of money as composition for statute duty,^(w) due in respect of the occupation of the parish tithes.^(x)

—.] *Repairs*.—The Court of B. R. will not entertain an application for a mandamus to repair a turnpike road, and this notwithstanding the question be, which of two parties is liable to repair under certain local acts of Parliament? because the best mode of proceeding is to indict the parish, who can then have the fine apportioned under stat. 3 Geo. 4, c. 126. Lord Denman, C. J., in giving judgment in such case said, he “knew no instance of a mandamus to repair a road,” and in the same case, it was stated by the Court, that “if such applications were entertained, it would have to try questions of guilty or not guilty on the state of the roads, and all questions affecting the liability.”^(y)

The writ lies to command the Quarter Sessions to receive and proceed *upon a general traverse to a presentment by a justice of the [133] peace, upon view of a highway being out of repair.^(z)

The writ also lies to command justices to issue their warrant for levying costs against a defendant, against whom an indictment had been preferred, for not repairing a highway, pursuant to stat. 5 & 6 Vict. c. 5, ss. 94, 95, and at the trial of which the defendant was found guilty, and a

(t) *Ex parte Whitmarsh*, 8 D. 431; 4 Jur. 823. See post, tit. “Application” (Demand and Refusal).

(u) *R. v. West Riding*, 3 T. R. 776. See tits. “Act of Parliament,” “Conviction,” “Quarter Sessions” (Appeal).

(v) *R. v. Marriott*, 1 D. & R. 166.†

(w) *R. v. Lancash. (J.)*, 2 M. & R. 519. S. C. 8 B. & C. 593.†

(x) *R. v. Buckinghamsh. (J.)*, 2 D. & R. 689.† *R. v. Lacy*, 5 B. & C. 706.† See tit. “Tithes.”

(y) Ante, p. 25. *R. v. Oxford Roads*, 4 P. & D. 154. S. C. 12 A. & E. 427;† 6 Jur. 216, n. *R. v. Bristol Dock*, 1 G. & D. 286. S. C. 2 Q. B. 64.† But see *R. v. Llandillo Roads*, 2 T. R. 232, and supra; “Fences,” &c. *R. v. Wilts. (J.)*, 8 D. 717, infra.

(z) *R. v. Wilts. (J.)*, Burr. 1530, 1532. S. C. 1 W. Blac. 467. *Matthew v. Carey*, Carth. 74; 1 Hawk. P. C. 217. Bac. Abr. tit. “Man.” (D.) See tit. “Presentment.”

valid order for the payment of the costs of the indictment had been made by the sessions.(a)

—.] *Obstruction*.—The writ lies to command a justice to hear and determine an information exhibited before him, by the surveyor of the pavements, under the provisions of a paving act, against a hackneyman, for taking his stand with his chariot, and plying for his fare there, and thereby obstructing a public thoroughfare.(b) It lies also to command justices to hear an appeal as to laying soil, &c. on a highway.(c)

—.] *Compensation*.—As to obtaining compensation for land taken for the purpose of a highway. See tit. *Compensation*.

—.] *Diverting, Stopping up, &c.*—The writ lies to command justices at Quarter Sessions to enter an application made for enrolling an order made by two justices of the county, for diverting and turning a public footway, and to enter continuances thereon to the next general Quarter Sessions of the peace to be holden in and for the said county, and at such sessions to hear and determine such application.(d) So it lies to command the Quarter Sessions to confirm a valid order of justices, for diverting and turning a footpath or highway, pursuant to stat. 55 Geo. 3, c. 68.(e) So it lies to command the Court of Quarter Sessions to enter continuances and hear an appeal against an order of justices for diverting certain public footways.(f) So it lies to command the Court of Quarter Sessions to enter continuances and hear an appeal against the confirmation of an order made under stat. 55 Geo. 3, c. 68, s. 2, for stopping up as useless and unnecessary part of a public highway,(g) or for diverting it.(h) So it lies to command the Quarter Sessions to enter continuances and hear an [*134] appeal against the inclosure of a highway, upon a writ of ad quod damnum.(i) So for stopping up a private road under an inclosure act.(j) In all these cases the applicant must be fully entitled to the writ.(k)

—.] *Toll-gate; Tolls*.—The Court will refuse a mandamus to command the Quarter Sessions to hear an original complaint touching the

(a) R. v. Martin, 13 L. J., N. S. 45, M. C. R. v. Clark, 13 L. J., N. S. 91, M. C. See tits. "Costs." "Quarter Sessions," (Justices.)

(b) Ante, p. 11. R. v. Rawlinson, 6 B. & C. 23.† S. C. 9 D. & R. 7.† And see Frost v. Williams, 7 A. & E. 779, 782.† See tit. "Quarter Sessions," (Justices.)

(c) R. v. North Riding (J.), 7 Q. B. 154.† S. C. 14 L. J., N. S. 91, M. C.

(d) R. v. Gloucester (J.), 6 N. & M. 115.† See tit. "Quarter Sessions."

(e) R. v. Worcestersh. (J.), 2 B. & A. 228. R. v. Surry (J.), 5 B. & C. 241.† R. v. Suffolk (J.), 6 B. & C. 111.†

(f) R. v. West Riding (J.), 4 B. & Ad. 685.† S. C. 1 N. & M. 426.† R. v. Surrey (J.), 7 D. & R. 857.†

(g) R. v. Essex (J.), 7 D. & R. 658.† R. v. West Riding (J.), 7 B. & C. 678.† S. C. 1 M. & R. 547. R. v. ——— (J.), 1 Chit. 164. R. v. Pembrokesh. (J.), 2 East, 212. And see M. & S. 231.

(h) R. v. Staffordsh. (J.), 3 East, 150. R. v. Townsend, 5 B. & A. 421. R. v. Staffordsh. (J.), 7 T. R. 81.

(i) R. v. Essex (J.), 1 B. & A. 373. R. v. Bucks (J.), 2 M. & S. 230. And see post, tit. "Application."

(j) R. v. West Riding (J.), 3 D. & R. 306.† See tit. "Inclosure."

(k) Ante, pp. 27, 28. See post, tit. "Application."

conduct of the trustees of a turnpike road, in the erection of a toll-gate, after a lapse of twenty years from its erection, on the ground that the application is too late; so that the applicant will be left to proceed by indictment for the nuisance; or by an action of trespass, if his passage be obstructed. (*l*)

It lies, however, to command the trustees of a turnpike road, to call a meeting under stat. 59 Geo. 3, for the purpose of establishing an uniform rate of tolls, to be taken at all the different toll-bars and toll-houses on the line of road, and to do all necessary acts for the calling of such meeting. (*m*)

It lies also to command the hearing of an appeal on a conviction for non-payment of tolls. (*n*)

—.] *Rate*.—The writ lies to command justices to make a highway rate, pursuant to an act of Parliament. (*o*) It lies also to command justices to receive an appeal, (*p*) made against a distress, or to levy a distress, (*q*) for nonpayment of a sum of money due for a highway rate. Formerly, however, if the legality of the rate were not clear, (*r*) or merely doubtful; or if for any other cause, the issuing of such a warrant might have subjected the justices to an action, the result of which might be doubtful, especially if no indemnity had been offered to the justices, the Court always refused the writ. Thus, the Court has refused, by mandamus, to command a magistrate to issue a distress warrant for a parish highway rate, under stat. 13 Geo. 3, c. 78, ss. 45, 67, made upon the occupier of lands within his district, as it appeared that in the magistrate's belief and in fact there was, a reasonable doubt as to the liability of such occupier to contribute to the repairs of the parish highways, and that the magistrate was likely to be sued if the warrant were granted and acted upon, and this although the occupier had not appealed against the rate. (*s*) But see the late stat. 6 & 7 Vict. *c. 67, s. 3, (*t*) which, [*135] as it provides a full indemnity for all acts properly done in execution of a writ of mandamus, it is apprehended the Court will not now so closely scrutinize the legality of the rate, &c.

—.] *Surveyors, Appointment*.—The writ lies to command justices to appoint road surveyors, (*u*) or to convene a vestry, and proceed to an

(*l*) *R. v. Cambridgesh. (J.)*, 1 D. & R. 325.† See also *R. v. Lancash. (J.)*, 12 East, 366. See also tit. "Canal Company," and post, tit. "Application."

(*m*) *R. v. Bury Roads*, 6 D. & R. 368.† See tit. "Tolls."

(*n*) *R. v. Middlesex (J.)*, 12 L. J., N. S., 59, M. C. See tits. "Conviction," "Quarter Sessions," (Appeal).

(*o*) *R. v. Lancash. (J.)*, 12 East, 368. *R. v. The Padding Vestry*, 9 B. & C. 461.† See tits. "Act of Parliament," "Borough" (Rate), "Church" (Rate), "County" (Rate), "Poor" (Rate).

(*p*) *R. v. Devon (J.)*, 1 M. & S. 410. *R. v. Lancash. (J.)*, 8 B. & C. 596.† See tits. "Drainage" (Rate), "Parish" (Rate).

(*q*) *R. v. Best*, 16 L. J., N. S. 102, M. C.

(*r*) *R. v. Mirehouse, &c.*, 2 A. & E. 632.† *R. v. Greame*, 2 A. & E. 614.† See *R. v. Cumberland (J.)*, 4 A. & E. 697.†

(*s*) *R. v. Greame*, 2 A. & E. 615; 2 A. & E. 632,† supra. *R. v. Morgan*, 2 A. & E. 618,† n. (*a*). S. C. 3 N. & M. 68,† nom. *R. v. Buckinghamsh. (J.)*; and see 1 B. & C. 485.† *R. v. Somersetsh. (J.)*, 1 H. & W. 82.

(*t*) App., and see tit. "Quarter Sessions" (Justices).

(*u*) *R. v. Dr. Pettward, &c. Burr.* 2453. *R. v. Middlesex (J.)*, 1 D. 116. Bac.

election,(v) either for the whole of the year or for part, where the appointment in due time has been neglected;(w) and it also lies to command parish officers to produce the rates, and rate and other books at the scrutiny of a poll, which has been taken at the election of surveyors of highways.(x)

—.] *Surveyors, Swearing in.*—The writ also lies to command justices to swear in surveyors of the highways.(y)

—.] *Surveyors, Accounts.*—The Court will, when a surveyor of the highways has improperly allowed the time for producing and passing his accounts to elapse, command him, by writ of mandamus, to produce them.(z) But such writ will not be granted to command the Quarter Sessions to enter continuances and hear an appeal against the allowance of the accounts of a surveyor of the highways, because no appeal lies to such sessions under stat. 5 & 6 Wm. 4, c. 50, s. 44, nor can the Court grant a writ to the Special Sessions to review their decision, by requiring them to re-examine such accounts, after they have once adjudicated and passed the accounts; although it appear that improper items have been passed, and notwithstanding the justices who passed them admit and depose that they did not fully investigate the case, believing that an appeal lay from them to the Quarter Sessions; the Court, in giving judgment saying, that to unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous, and many authorities prove the Court of B. R. has not the power, and there are none to the opposite effect.(a)

—.] *Surveyor, Reimbursement.*—The writ has been granted to command the making of a rate to reimburse a surveyor of the highways, [*136] *a sum of money he had expended in the execution of his office, under stat. 3 & 4 Wm. & M. c. 12.(b)

—.] *Books, &c., Delivery of.*—The writ lies to command a surveyor of highways to deliver to the churchwardens of a parish, under

Abr. tit. "Man." (D.) See tits. "Churchwarden" (Appointment), "Office" (Appointment).

(v) Ex parte Grossmith, 10 L. J., N. S. 359, Q. B. See tits. "Corporation Municipal," "Parish."

(w) R. v. Denbighsh. (J.), 4 East, 142. R. v. Sparrow, Stra. 1123; 1 Const's Bott. 17th edit., 1793. R. v. Baldwin, 7 T. R. 169. R. v. King's Newton (Inbabs.), 1 B. & Ad. 830.† See tit. "Churchwardens."

(x) R. v. Fall, 1 G. & D. 118. S. C. 1 Q. B. 636.† See infra as to books, and tit. "Books," "County" "Treasurer."

(y) R. v. Petteward, Burr. 2452. Com. Dig. tit. "Man." (A.) See tit. "Office" (Swearing in).

(z) R. v. Lewis, 1 D. 530. R. v. Denbighsh. (J.), 4 East, 142. R. v. Sparrow, Stra. 1123. R. v. Norwich (Mayor), 1 B. & Ad. 310.† See tits. "Accounts," "Churchwardens" (Accounts).

(a) Ante, p. 10, 11. R. v. West Riding (J.), 1 G. & D. 198. S. C. 1 Q. B. 624.† S. C. 10 L. J., N. S. 137, M. C. See tits. "Courts Inferior" (Rehearing), "Quarter Sessions" (Rehearing).

(b) Haself's case, Str. 211. R. v. Wallingford, Kel. 209; Com. Dig. tit. "Man." (A.) See tits. "Churchwarden" (Reimbursement), "Drainage" (Reimbursement).

stat. 13 Geo. 3, c. 78, s. 48, all books of account in his custody, power, or possession, relating to the highways within the parish. And to such a writ, a return "that on and since the test of the writ, the defendant had not, nor has had the books, &c., nor any of them, &c.," is good; although it unnecessarily allege that the defendant had them not on a prior day, when it is surmised in the writ that they were demanded. The defendant is not bound to negative a possession intermediate between the demand and the test; and whether, under the circumstances, the books, &c. were in the power of A. is a question to be raised by a traverse to the return, or by an action for a false return. (c)

—.] *Books, Inspection, &c.*—So the writ lies to command road trustees to grant inspection of books, &c.; but the right to such inspection must be clear, either by act of Parliament or otherwise, and must appear upon the affidavits. (d)

—.] *Clerk, Admission.*—The writ lies to admit to the office of clerk to turnpike trustees under the general turnpike acts; but not if the office be full, as in such case the public suffer no inconvenience. (e)

—.] *Clerk, Restoration.*—So a mandamus to restore to such office will be granted on an illegal removal. (f)

—.] *Miscellaneous Matters.*—The writ lies to command a surveyor of the highways to pay the arrears of rent for land taken up in the formation of a road. (g) So it lies to command justices to convict a surveyor of highways in 5*l.*, and to make an order upon him to limit and appoint a time for the repair of a road; but not if the magistrates have exercised their discretion not to convict. (h) So it lies to command justices to hear the appeal of a surveyor under stat. 4 & 5 Vict. c. 59. (i) The writ also lies to command the Quarter Sessions to enter continuances and hear an appeal against a conviction of one justice, under the Turnpike Act, 4 Geo. 4, *c. 95. (j) So to hear an appeal against an order made *^[137] by commissioners under a local turnpike act; (k) but where, by

(c) R. v. Round, 5 N. & M. 427.† S. C. 4 A. & E. 139,† where see a form of writ and return, 1 Har. & W. 546. R. v. Payn, 6 A. & E. 404;† 1 W. W. & H. 99; 2 Jur. 47. R. v. Hopkins, 4 P. & D. 550. S. C. 1 Q. B. 161,† See tits. "Books, &c.," "Company," "Corporation" (Municipal), "County," "Drainage," and see post tit. "Return."

(d) Ante, p. 16. R. v. Northleach Roads, 5 B. & Ad. 978.† See note (o).

(e) Ante, p. 12. R. v. Cheshunt Roads, 5 B. & Ad. 438, 439,† note. (u) See also R. v. Dolgelly Union, 8 A. & E. 562.† See tit. "Office" (Admission).

(f) Ante, p. 12. R. v. Wrexham Roads, 5 A. & E. 581.† See tit. "Office" (Restoration.)

(g) R. v. Baldwin, 3 P. & D. 124. S. C. 8 A. & E. 947.† See tit. "Compensation" (Payment).

(h) Ante, pp. 12, 13. R. v. Wilts. (J.), 8 D. 717; and see supra, and tit. "Conviction."

(i) R. v. Derbyshire (J.), 7 Q. B. 193.† S. C. 14 L. J., N. S. 84. Q. B. See tits. "Act of Parliament," "Court Inferior" (Hearing), "Quarter Sessions" (Appeal).

(j) R. v. Middlesex (J.) 2 D., N. S. 719. R. v. Bedfordsh. (J.), 3 P. & D. 21. See tit. "Quarter Sessions" (Appeal).

(k) R. v. Worcestersh. (J.), 9 D. & R. 211.† See tit. "Act of Parliament."

such local act, an appeal when heard is final, in such case a mandamus will not be granted to command a rehearing of it.(*l*.)

HOSPITAL.] *Sister, Restoration.*—The writ lies not to restore to the place of sister in an hospital, she being but an almswoman at will, and under the jurisdiction of a visitor.(*m*)

—.] *Surgeon, Swearing in.*—The writ lies not to swear in a surgeon of an hospital, because he is a mere private servant, and not a public officer.(*n*)

—.] *Restoration.*—And for the same reason, the writ does not lie to restore to such a place.(*o*)

—.] *Seal.*—The writ lies to command the master of an hospital to affix its common seal to a deed of presentation, presenting to a vicarage with the gift of such hospital.(*p*)

HOSPITALLER.] *Restoration.*—The writ does not lie to restore an hospitaler,(*q*) he not being an officer of public concern.

HOSTMEN OF NEW CASTLE.] See tit. *New Castle Hostmen*.

INCLOSURE.] *Appeal.*—The writ lies to command justices of the peace at Quarter Sessions to cause continuances to be entered upon an appeal against an order or adjudication made by a commissioner under a local inclosure act, where such power of appeal is given, and the appeal ought to be heard.(*r*)

As to inclosure of highway, or making, &c., a highway under inclosure acts, see tit. *Highway*.(*s*)

The writ has also been granted to command the surveyor and commissioner, under an inclosure act, to ascertain if there be any modus as to the [*138] lands, the subject of the inclosure.(*t*) Also to command a commissioner, under an inclosure act, to effect an exchange if he have

(*l*) R. v. West Riding (J.), 3 N. & M. 86.† S. C. 1 A. & E. 606. See tits "Certiorari," "Courts Inferior" (Rehearing), "Quarter Sessions" (Rehearing).

(*m*) R. v. Wheler, 3 Keb. 360; Bac. Abr. tit. "Man." C. 2. See tit. "Office" (Freehold).

(*n*) Anon. 7 Mod. 118; Bac. Abr. tit. "Man." C.; and see tit. "Office."

(*o*) Anon. Comb. 41.

(*p*) R. v. Kendall, 4 P. & D. 603. S. C. 1 Q. B. 366;† when the writ is merely to affix the seal, it may properly be directed to the Master alone. See tit. "College" (Seal), "Corporation Municipal" (Seal), "Seal."

(*q*) R. v. London Water Works, 1 Lev. 23, per Wyndham, J. See tit. "Office" (Public).

(*r*) R. v. Lancashire(J.), 1 B. & A. 630.† R. v. Middlesex (J.), 1 Chit. 366.† R. v. Wilts. (J.), 13 East, 351. R. v. West Riding (J.), 2 B. & C. 228.† R. v. Gloucestershire (J.), 3 M. & S. 127. See tit. "Act of Parliament," "Drainage," "Quarter Sessions" (Appeal).

(*s*) 1 B. & Ad. 378.† infra. And see tit. "Act of Parliament."

(*t*) Anon., 2 Chit. 251.† In such case the rule nisi was ordered to be served on the vicar or his impropiator. See tit. "Tithe."

power to, and should do so.(u) And also to command Inclosure Commissioners to set out and appoint an occupation road to two several allotments by them set out, and to make and publish their award as directed by the local act.(v)

INHIBITION.] As to such a return, see tit. *Churchwarden (Return)*; *Registrar (Return)*.

INN BURGESS OF WIGAN.] See tit. *Burgess (Inn, &c.)*, pp. 54, 57.

INN OF CHANCERY.] In analogy with the law of mandamus as to Inns of Court, so such writ does not lie to command one elected principal of an Inn of Chancery to attend before the benchers of the Inn of Court to which such Inn of Chancery is attached, for the purpose of enabling such benchers to decide upon the validity of his election; unless it be clearly shewn that the benchers of such Inn of Court have, on some former occasion, exercised such jurisdiction *in invitum*.(w)

As to the granting of the writ to command admission, &c., see titles *Attorney*; *Barnard's Inn*; *College (Member)*; *Franchise (Freedom)*; *Inn of Court (Admission)*.

INN OF COURT.] It is clearly settled, that the writ of mandamus cannot be issued against the Inns of Court as to any matter connected with their internal regulations, &c.; because they are private and voluntary societies submitting to government, and also, that the ancient and usual way of redress for any wrong done by them as to admission, &c. of members, is by appeal to the Judges of the superior Courts of Common Law,(x) who have a domestic jurisdiction over the Inns.

——.] *Admission as Member*.—The Court of B. R. will not grant a mandamus to command the benchers of an Inn of Court to admit an individual to become one of its members, in order that he may qualify himself to be called to the Bar; because such a society being purely voluntary, has a discretion as to the admission or rejection of applicants.(y)

(u) R. v. Flockwold Inclosure, 2 Chit. 251.† See tit. "Commissioners."

(v) R. v. Cockermouth Inclosure Act, 1 B. & Ad. 378.† See tits. "Act of Parliament," "Award," "Highways."

(w) Ante, p. 10. R. v. Allen, &c., 3 N. & M. 184.† S. C. 5 B. & Ad. 984.† See tit. "Inn of Court."

(x) See ante, p. 21, and infra, "Admission to Degree, &c." Per Hale, C. J., in Appleford's case, 1 Mod. 84, citing R. v. Gray's Inn, Dougl. 353. See Townsend's case, Raym. 69, and R. Physicians' (Coll.), 2 Show. 178, 179, n. (b), 3rd edit., per Pemberton, C. J.; Bac. Abr. tit. "Man." C. 2. See tits. "Inn of Chancery," "Visitor."

(y) Ante, pp. 12, 13. R. v. Lincoln's Inn, 4 B. & C. 855.† S. C. 7 D. & R. 351.† R. v. Barnard's Inn, 5 A. & E. 23.† R. v. Gray's Inn, Dougl. 359. Protector v. Crayford, Sty. 457. Dr. Widdrington's case, Raym. 69; Com. Dig. tit. "Man." (B.); Bac. Abr. tit. "Man." C. 2. See tits. "Advocate of Doctors' Commons," "College" (Admission), "Distribution," "University" (Admission).

[*139] *——.] *Admission to Degree, &c.*—So the writ does not lie to command the benchers of an Inn of Court to admit to the degree of barrister-at-law; for the only mode of relief is by appeal to the Judges of the superior Courts of Common Law, who have a domestic jurisdiction over the Inns.(z)

——.] *Restoration to Degree.*—So the Court of B. R. has constantly held, that a mandamus does not lie to command restoration to the degree of barrister-at-law, of which the prosecutor has been improperly deprived; the proper proceeding in such a case being, as before stated, by appeal to the Judges.(a)

INQUEST.] The writ does not lie to command the jury of an inquest to find a particular fact.(b)

INSANITY.] See titles *Lunatic*; *Poor*.

INSIGNIA.] See titles *Corporation Municipal (Insignia, &c.)*; *Insignia, &c.*; *Mayor*; *Seal*.

INSOLVENT.] The writ has been granted to command justices to direct the clerk of the peace to assign over the effects of a debtor, to a creditor, in pursuance of stat. 2 Geo. 2, c. 22, but not to a particular creditor by name, because the justices are not so authorized by the statute.(c)

So the writ has been granted to command justices to give judgment in a case, upon the statute for releasing poor prisoners.(d)

So the writ lies to command the commissioners of the Court, for the relief of insolvent debtors, to receive and hear the petition of a person desiring and entitled to obtain the benefit of the act (1 Geo. 4, c. 119), and to proceed to an adjudication thereupon.(e)

——.] *Discharge.*—The writ has also been granted to command justices to discharge a prisoner, in pursuance of an act of Parliament, [*140] for the *relief of poor prisoners,(f) and it has also been granted

(z) Ante, p. 21. *R. v. Gray's Inn (Bencher)*, 1 Doug. 353. *Boorman's case*, March. 177, which was a writ of restitution. *Rakestraw & Brewer*, 2 P. Wms. 511. *Townsend's case*, Raym. 69. S. C. 1 Keb. 458. *R. v. Lincoln's Inn*, 4 B. & C. 856.† *R. v. Coll. of Physic.*, 2 Show. 179, n. (b). 3rd edit. See tits. "Advocate of Doctors' Commons," "University" (Degree), "Visitor."

(a) Ante, p. 21. *Boorman's case*, March. 177. *R. v. Gray's Inn*, Doug. 359. See *Townsend's case*, 1 Keb. 458. S. C. Raym. 69. *Estwick's case*, Sty. 42. *Dr. Withrington's case*, 1 Keb. 122. See tits. "College," "Physicians' College," "University," "Visitor."

(b) Comb. 239; 1 W. Blac. 64. S. C. 1 Wils. 283. See tits. "Coroner," "Court Inferior" (Rehearing), "Freeman," "Jury."

(c) *R. v. Surrey (J.)*, 2 Barn. 410, and cases there cited. See tits. "Act of Parliament," "Bankrupt," "Quarter Sessions" (Justices).

(d) *Trevaignon's case*, Comb. 203. See tits. "Act of Parliament," "Quarter Sessions" (Justices), "Bankrupt."

(e) *Ex parte Deacon*, 5 B. & A. 759. See tit. "Pension." See tit. "Act of Parliament."

(f) *R. v. Surrey (J.)*, 2 Show. 74, T. 31, Car. 2, B. R.; Bac. Abr. tit. "Man." (D.) See tit. "Act of Parliament."

to command the Marshal of the Queen's Bench Prison, to include in his list of debtors the name of the applicant, he being duly entitled, in order that he might take the benefit of the insolvent act, 34 George 3, c. 69;(*g*) so, it has been granted for the same purpose, under stat. 44 Geo. 3, c. 108, s. 1;(*h*) also to command the making of an order, to cause a prisoner in execution to be brought up under stat. 2 Geo. 2, c. 22, in order that he might take the benefit of the Insolvent Debtors' Acts.(*i*) So it has been granted to command the Court of Quarter Sessions, to inquire and give the benefit of the Insolvent Debtors' Act to a prisoner if duly entitled to it.(*j*) So where an insolvent debtor brought up to the Quarter Sessions, under the repealed insolvent act of 34 Geo. 3, c. 69, was remanded upon a charge, which he gave notice he would disprove at a subsequent adjournment of the sessions; the Court of B. R. granted him a mandamus, commanding that he should be brought up for such purpose.(*k*)

INSITUATIONS, PRIVATE.] The Court of B. R. constantly interferes by mandamus, with respect to private foundations, as in the cases of charities, dissenting ministers, lecturers, visitors, &c.,(*l*) but the applicants must be legally entitled to that for which they ask.(*m*)

INSPECTION OF BOOKS, ROLLS, &c.].—See titles *Accounts*; *Books*; *Company*; *Corporation Municipal*; *Manor Rolls*; *Rate*.

JOINERS' COMPANY.] See titles *Company*; *Franchise*; *Freedom (Company)*; *Freeman*.

JOINT STOCK COMPANY.] See tit. *Company (Joint Stock)*.

JUDGMENT.] *Enforcing*.—The writ does not lie to enforce a judgment obtained in an action in one of the superior Courts, because there is a specific legal remedy most efficacious in its nature, namely, a writ of execution in the ordinary form. Thus, where the prosecutor had obtained a judgment, and entered it up against a corporation, which afterwards appeared to have no assets; the Court refused to issue the writ to command them to pay the amount of such judgment, merely on the ground that an

(*g*) R. v. Jones, 6 T. R. 28. R. v. Surrey (J.), 6 T. R. 77.

(*h*) Ex parte Chiffench, 6 East, 346 and 347, n. (*a*).

(*i*) R. v. Ipswich (Bailiffs), 7 East, 84. Ex parte King, 7 East, 91, and cited in 15 East, 126; and see tit. "Quarter Sessions."

(*j*) Ante, p. 11. Ex parte King, 7 East, 90, and cited in 15 East, 126; 44 Geo. 3, c. 108. See tits. "Courts Inferior."

(*k*) R. v. Surrey (J.), 6 T. R. 76; and see 3 D. & R. 310.† See tit. "Bankrupt."

(*l*) Which tits. see.

(*m*) Ante, p. 28. R. v. Ottery St. Mary, 3 G. & D. 383. S. C. 4 Q. B. 157,† where see per Ld. Denman, C. J. The cases of mandamus to admit dissenting ministers are clearly cases of private trust. See tits. "Charity," "Church," "Dis-senters," "Office" (Public Election).

[*141] execution might *turn out fruitless.(n) But if the judgment be not so entered up against the company, then it seems the Court will grant the writ of mandamus.(o)

As to judgment in compensation cases, see tit. *Compensation* (*Company*).

As to judgment and execution of Inferior Courts, see tits. *Courts Inferior* (*Judgment, Execution, &c.*); *Costs*.

JURATS.] The writ of mandamus has often been granted in respect of the office of jurat of a municipal corporation, because it is a public office and a freehold.(p)

—.] *Election*.—See stat. 6 & 7 Vict. c. 89, App., the provisions of which should be followed.

—.] *Admission and Swearing in*.—So the writ has been granted to admit and swear in to the office of jurat.(q)

—.] *Restoration*.—So the writ lies to restore to such an office after unlawful deprivation.(r)

And it lies to return a jurat, as mayor elect, if duly entitled.(s)

JURY.] The writ does not lie to command a jury to find a particular verdict, or to present a particular fact.(t)

As to summoning a jury. See tit. *Manor* (*Leet Jury*).

JUSTICE'S CLERK.] *Restoration*.—The writ does not lie to restore a justice's clerk to his office, although he may have been dismissed without cause, and although it be such an office as entitles to compensation under stat. 5 & 6 Wm. 4, c. 76, and is recognised by several public acts of Parliament; for such clerk has no permanent interest in his office, being in at the mere pleasure of the justices, in this respect he resembles a mere vestry clerk:(u) and as the office of clerk to a stipendiary magistracy is not within the stat. 5 & 6 Vict. c. 111, so a mandamus under such statute for compensation for loss of such office does not lie.(v)

(n) Ante, p. 23. R. v. Victoria Park, 4 P. & D. 639. S. C. 1 Q. B. 238,† citing and distinguishing R. v. St. Katherine's Dock, 4 B. & Ad. 360.† S. C. 1 N. & M. 121,† and R. v. Nottingham Old Works, 6 A. & E. 335.† S. C. 1 N. & P. 480.† See tits. "Company," "Distress," "Execution."

(o) 4 B. & Ad. 360.† S. C. 1 N. & M. 121, supra.†

(p) Anon. 1 Lev. 148; Com. Dig. tit. "Man." (A.) See tits. "Alderman," "Office," (Public).

(q) R. v. Rye (Mayor), Burr, 798; 2 Ld. Ken. 468. See tit. "Office" (Admission); (Swearing in).

(r) Anon. 1 Lev. 148. See tit. "Office" (Restoration).

(s) 7 Mod. 365. S. C. Stra. 1145; and see Burr. 1013. See tit. "Mayor."

(t) Clitheroe's case, Comb. 239. R. v. Montacute (Ld.), 1 W. Blac. 64. S. C. 1 Wils. 283. See tits. "Courts Inferior," "Freeman" (Presentation &c.), "Inquest."

(u) Ex parte Sandys, 1 N. & M. 591.† S. C. B. & Adol. 863, also cited in R. v. Bridgewater (Mayor), 1 N. & P. 470.† S. C. 6 A. & E. 339.† See tits. "Guardians of Poor" (Clerk), "Office" (Freehold), "Quarter Sessions" (Justices), "Vestry" (Clerk).

(v) R. v. Manchester (Borough), 16 L. J., N. S., 27, Q. B. See tit. "Compensation" (Office).

*KEYS.] See titles *Charity; Church (Keys)*.

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KING.] See titles *Crown; Customs; Excise; Treasury Lords*.

KING'S BEAM.] *Master Weigher; Restoration*.—It appears that a mandamus has been granted to restore to the office of master weigher of the King's Beam.(w)

KNIGHT.] See titles *Dignity; Knight Templar*.

KNIGHT TEMPLAR.] *Restoration*.—The writ does not lie to restore a knight templar.(x)

LANDLORD.] *Possession*.—The writ lies to command certain magistrates who have refused so to do, to proceed to view certain premises of the applicant, and deliver possession thereof to him as the landlord thereof, pursuant to stat. 11 Geo. 2, c. 19, s. 16, there being no sufficient distress on the premises, and the defendant having deserted them.(y)

But formerly when the magistrates from a doubt of their jurisdiction, incorrectly declined to give such possession, the Court usually refused by mandamus, to compel them so to do.(z)

So, the writ lies to command justices to proceed and give judgment in a certain complaint depending before them on the stat. 11 Geo. 2, c. 19, for the relief of landlords; but a return by such justices, that they have heard and determined the complaint that was before them, is good.(a)

But it lies not to command magistrates to give restitution under stat. 11 Geo. 2, c. 19, pursuant to the order of certain justices of assize, as such magistrates have no such jurisdiction or power given to them by the act.(b)

—.] *Goods*.—The writ also lies to command justices at sessions to enter continuances, and hear an appeal against an order of justices, under stat. 11 Geo. 2, c. 19, s. 4, for having fraudulently conveyed away goods to prevent the landlord distraining the same.(c)

(w) Anon. 1 Barn. 123, 135. See tit. "Office" (Restoration).

(x) R. v. London Waterworks, 1 Lev. 123, per Wyndham, J. See tits. "Abbot," "Dignity," "Knight," "Monk," "Office," "Prior," "Visitor."

(y) Ex parte Fielder, 8 D. 535. S. C. 4 Jur. 507. See also Ashcroft v. Bourne, 3 B. & Ad. 684.† See tits. "Act of Parliament," "Forcible Entry, &c.," "Quarter Sessions" (Justices).

(z) 8 D. 535, supra. But see R. v. Kent (J.), 14 East, 395. See also 1 M. & S. 193. But see stat. 6 & 7 Viet. c. 67, s. 3, which, as it confers a full indemnity for all lawful acts done in execution of a mandamus, it is apprehended the Court will now more readily grant the writ.

(a) R. v. Richardson, 1 Wils. 21. See tits. "Courts Inferior," (Judgment, &c.), "Quarter Sessions" (Justices).

(b) Ante, p. 10, 11. R. v. Traill, 4 P. & D. 325. S. C. 12 A. & E. 761.† S. C. 10 L. J., N. S. 56, M. C. See tit. "Act of Parliament."

(c) R. v. Chesh. (J.), 2 N. & M. 827.† See tits. "Carriers," "Quarter Sessions" (Justices), "Railway" (Goods).

LAND TAX COMMISSIONERS.] *Clerk; Election*.—The writ lies to command *the commissioners of the land tax of a parish, to elect a [*143] clerk in the department of the rates and duties on windows, houses, lights, &c., it being a beneficial office instituted by act of Parliament, 25 Geo. 3, c. 4, and having certain fees and profits annexed to it.(d)

—.] *Admission*.—So the writ lies to command the commissioners of land tax, to admit one who had the majority of legal votes(e) to the office of clerk of the commissioners.

LECTURESHIP.] *Lecturer*.—The writ lies for a lectureship.(f) In order to constitute a lectureship, there must be both an endowment and a right to use the pulpit.(g) It has, however, been sometimes endeavoured to liken the function of a lecturer in all respects to that office, to which a person is admitted by the institution of a bishop in the case of an ecclesiastical benefice, and to the cases of curates, schoolmasters, &c., but it is clear that in the latter appointments there are particular provisions which certainly do not apply to lectureships.(h)

The court of B. R., has often interfered by mandamus in the case of lecturers of parish churches,(i) but as before said, the lectureship must have a profit or endowment annexed to it,(j) or the writ will be refused. So, that it will not lie in respect of a lectureship, the stipend or endowment of which depends solely upon voluntary contributions, or is paid out of the poor rates, for the rector in such cases may refuse the use of the pulpit, the fee thereof being in him; unless there be shewn a contrary immemorial custom, to elect without such consent.(k) So, if it appear, that the lectureship was appointed within time of memory, and supported by voluntary contributions without any lay fee, or temporal right in the

(d) R. v. St. Martin L. T. Commers., 1 T. R. 146, cited in R. v. Surrey (J.), 2 Show. 74, n. (d), 3rd edit. Com. Dig. tit "Man." (A.). Bac. Abr. tit. "Man." (D.) See tits. "Act of Parliament," "Office" (Public, Fees).

(e) R. v. Thatcher, 1 D. & R. 426,† citing 1 T. R. 146, supra. In R. v. Beedle, 3 A. & E. 474,† is cited R. v. Thatcher, supra. See tits. "Office," (Admission), "Recorder" (Admission).

(f) Bac. Abr. tit. "Man." C. See tit. "Office."

(g) 1 Wils. 15. Bac. Abr. tit. "Man." C.

(h) R. v. Canterbury (Archbp.), 15 East, 135.

(i) R. v. Canterbury (Archbp.), 15 East, 132. R. v. London (Ep.), 1 Wils. 11, 15. R. v. London (Ep.), 13 East, 420. R. v. London (Ep.), 1 T. R. 331, 396. R. v. Field, 4 T. R. 125. R. v. Exeter (Ep.), 2 East, 462. See also 7 East, 345; 15 East, 132. Vincent v. London (Ep.), P. 13 G. 1; and R. v. Rushworth, Kel. 287. See also ante, p. 26, and tit. "Office."

(j) R. v. Barker, 1 W. Blac. 352, per Lord Mansfield, C. J. See tit. "Office" (Fees).

(k) Ante, p. 27, 28. R. v. Barker and Others, 1 W. Blac. 352, n. (e). Cas. temp. Ld. Holt, 433. R. v. London (Ep.), 1 Wils. 11. S. C. Stra. 1192. R. v. London (Ep.), 1 T. R. 331. R. v. Field, 4 T. R. 125; and see R. v. Exeter (Ep.), 2 East, 462. R. v. London (Ep.), 13 East, 419. R. v. Canterbury (Archbp.), 15 East, 117. R. v. Carlisle, 2 Burn's Eccl. Law, 113, ed. 1809. R. v. Oxford (Ep.), 7 East, 348, where see form of writ. Bac. Abr. tit. "Man." C.

party applying, and that he had not the consent of the rector, though chosen by the parishioners to *be lecturer, the Court will refuse it.^(l) So, where another has been elected by other of the inhabi- [*144] tants, and admitted by the rector, the writ will be refused.^(m) But if there be a fixed salary annexed to a lectureship, that is some evidence of a custom, and as the rector cannot in such a case withhold the use of his pulpit, the Court will, if necessary, grant the writ in aid of him appointed lecturer.⁽ⁿ⁾

This subject is treated of as follows:—

LECTURESHIP.				LECTURESHIP—Lecturer.			
Lecturer.				Admission -	-	-	145
Election	-	-	144	Compensation	-	-	145
License	-	-	144	Application	-	-	145

—.] *Election*.—The writ has been granted to command the election of a lecturer.^(o) But a writ was referred to command the rector to certify such election, in a case where there was no immemorial custom for the lecturer to use the pulpit without the rector's consent, and the lecturer was paid out of the poor rates.^(p)

—.] *License*.—The Act of Uniformity, 13 & 14 Car. 2, made a license necessary, in order to enable a lecturer to preach; and give authority to the bishop, &c. to grant it, if the applicant appeared to him to be duly qualified.^(q)

The writ, on a proper case will therefore be granted to command a bishop to proceed to inquire whether the prosecutor be duly qualified to be licensed as a lecturer according to the statute; because no appeal lies.^(r) Many *dicta* of the Judges are also found^(s) to that effect that the Court of B. R. will not suffer the bishop to exercise arbitrarily the power given to him by the statute, but that where a person appears to have a right, it will command the bishop to grant a license, or shew good reason to the contrary. Such a course does not shew, that the judgment of the bishop upon a mat-

(l) 13 East, 419, *supra*.

(m) *R. v. London (Ep.)*, 1 Wils. 11. S. C. *Str.* 1192. See 1 T. R. 331. Com. Dig. tit. "Man." (B.)

(n) See ante, p. 27, 28. *R. v. Chester (Ep.)*, 1 T. R. 402. *R. v. London (Ep.)*, 1 T. R. 331. See tit. "Office."

(o) *M. T.*, 4 Anne, cited in *R. v. Dr. Bland*, 7 Mod. 356, n. (f). See tit. "Office" (Election.)

(p) Ante, p. 143. *R. v. Field*, 4 T. R. 125. *R. v. London (Ep.)*, 1 T. R. 331; 2 East, 462; 7 East, 345. Bac. Abr. tit. "Man." C. See tit. "Office" (Fees, &c.)

(q) *R. v. Lichfield (Ep.)*, 2 Barn. 365. *Colefat v. Newcomb*, M. 4 Anne, there cited. As to the bishop's power in general, see *Specott's case*, 5 Rep. 57; 13 East, 419. Bac. Abr. tit. "Man." (C.) See tits. "Discretion," "License."

(r) Ante, p. 21. *R. v. Litchfield (Ep.)*, 2 Barn. 365. *Colefat v. Newcomb*, M. 4 Anne, there cited. *R. v. Exeter (Ep.)*, 2 East, 461. *R. v. Canterbury (Archbp.)*, 15 East, 132. *R. v. Oxford (Ep.)*, 7 East, 348, 600, per Lord Ellenborough, C. J. *R. v. London (Ep.)*, 13 East, 424; 1 T. R. 331. Bac. Abr. tit. "Man." (C.) See tits. "Act of Parliament," "Discretion."

(s) 15 East, 136. *R. v. London (Ep.)*, 13 East, 420, note. S. C. 1 Wils. 11, 15. S. C. *Str.* 1192.

ter of which he has exclusive cognizance, and which the Legislature has confided to his sole judgment, such as the question of fitness of the applicant [*145] of whom *he is to approve before he licenses him; is not a good reason against the interference of the Court by mandamus;(t) and in fact there has never been an instance of a mandamus to compel a bishop to approve and license a lecturer, where the question turned on the approbation or disapprobation of the bishop as to the fitness of the applicant:(u) nor has there been a case where the Court has so interfered against the bishop, in abrogation of his judgment, after he has determined against the personal fitness of the applicant for the license.(v) So the Court will not command the bishop to license, &c., if the lecturer have not a right to the use of the pulpit;(w) or without the consent of the rector where such lecturer is supported by voluntary contributions, and there is no custom to elect without such consent.(x)

——.] *Admission*.—The writ has often been granted to command the admission of a lecturer to his office,(y) or endowed lectureship.(z)

——.] *Compensation*.—The writ lies to command a municipal corporation to secure by bond, under the corporate seal, the stipend of a minister or lecturer duly entitled to compensation under stat. 5 & 6 Wm. 4, c. 76, s. 68.(a)

——.] *Application*.—Some of the older cases have decided, that inas-

(t) Ante, p. 12, 13. R. v. Canterbury (Archbp.), 15 East, 117, 123, 124, per Lord Ellenborough, C. J. R. v. St. Bartholomew, (Churchwardens), 3 Salk. 86. S. C. Holt. Rep. 418. Turtton v. Reynolds, 12 Mod. 433; and see Id. Raym. 1206. R. v. Blooer, Burr. 1045; 1 Wils. 11. R. v. Gloucester (Ep.), 2 B. & Ad. 162. Bac. Abr. tit. "Man." (C.) See tits. "Alehouse," "Discretion," "School" (School-master License).

(u) Ante, p. 14, 15. R. v. Canterbury (Archbp.), 15 East, 138, 139, per Lord Ellenborough, C. J.

(v) 15 East, 124, supra. And Lord Ellenborough, in 15 East, 150, while commenting upon R. v. Blooer, Burr. 1045, (which was an application for a mandamus to a parishioner and an inhabitant of a chapelry, to restore a curate to a curacy from which he had been forcibly turned and kept out, no rights or dues of the ordinary as such, being in question,) remarked, "that Lord Mansfield appeared in that case to have said, "If the bishop had refused *without cause* to license the prosecutor, he might have had a mandamus to compel the ordinary to grant him a license." And (said Lord Ellenborough) indeed, as it is the party's only remedy, if the license be refused *without a cause*; the bishop being to act there as in the case of an institution; if, therefore, he causelessly refused the license, the Court would grant the mandamus, and if the bishop could not or would not assign any cause, he might be compelled to admit him. But how is that argument to be extended to a case where the bishop assigns the only cause of rejection which the statute requires to exist, viz., the *disapprobation* of the person applying; and when he satisfies the Court, by the most explicit and solemn declaration, that this disapprobation is the result of deliberate inquiry and conscientious judgment?" See tits. "Alehouse," "Discretion."

(w) Ante, p. 27, 28. R. v. London (Ep.), 1 Wils. 11. S. C. nom. Lecturer of St. Anne, Stra. 1192.

(x) Ante, p. 143, 144. R. v. London (Ep.), 1 T. R. 331.

(y) R. v. Barker, Burr. 1267, 1268, 1269, 1270, per Lord Mansfield, C. J. See tits. "Act of Parliament," "Office" (Admission).

(z) R. v. Bathurst, 1 W. Blac. 209. R. v. Barker, 1 W. Blac. 352, n. (c).

(a) R. v. Liverpool (Mayor), 3 N. & P. 280. S. C. 8 A. & E. 176.† See tit. "Compensation" (Office Bond).

much as the statute requires that the applicant must be first approved and thereunto licensed by the archbishop of the province or bishop of the *diocese, &c., the Court will not entertain a motion for a mandamus to the bishop to license a lecturer appointed by the parish, upon the previous refusal of the bishop to do so, upon the alleged ground of unfitness; unless it be shewn that the like application has also been made to the archbishop and rejected by him: for as the Court will only grant a mandamus where the party has no other remedy, it must be satisfied that an endeavour has been made to procure a license from those who have the power to grant it.(b).

LEET COURT.] See titles *Courts Inferior (Manor Courts)*; *Manor (Leet)*.

LEET COURT, STEWARD.] See tit. *Manor (Leet)*.

LEGACY.] The writ does not lie to command the delivery or payment of a specific legacy or sum of money to a particular legatee,(c) because there is no legal right, but merely an equitable one,(d) over which the Court of Equity has sole and competent jurisdiction.(e)

LIBRARIAN OF COLLEGE.] See tit. *College (Librarian)*.

LICENSE.] See titles *Alchouses*; *Discretion*; *Lectureship (License)*; *Manor (License)*; *Physicians' (College)*; *School (Schoolmaster)*.

LICENSE TO DEMISE.] See titles *Discretion*; *Manor (License)*.

LICENSE TO DIG, &c.] See titles *Discretion*; *Manor (License)*.

LIGHTING RATE.] See titles *Borough (Rate)*; *County (Rate)*; *Drainage (Rate)*; *Poor (Rate)*; *Parish (Rate)*; *Rate*.

LIVERY.] *Municipal Corporation, Admission*.—The writ lies to admit to the office of liveryman of a municipal corporation.(f)

—.] *Company, Admission*.—The writ also lies to command admission to the office of liveryman of a company.(g)

(b) 13 East, 418, supra. R. v. Price, 11 A. & E. 735.† See post, tit. "Application" (Demand and Refusal).

(c) See Blackborough v. Davis, 1 P. Wms. 46; 2 Vern. 710. Trevor v. Trevor, 1 P. Wms. 628. See tit. "Administration," "Will."

(d) Ante, p. 27, 28. See tit. "Trust."

(e) Ante, p. 22, 23. See post, tit. "Writ" (Form of.)

(f) See stat. 6 & 7 Vict. c. 89, App. Taverner's case, Raym. 446, where see a form of return. Com. Dig. tit. "Man." (A.) See tits. "Company," "Corporation" (Municipal), "Franchise," "Freedom," "Freeman," "Office" (Admission).

(g) Taverner's case, Raym. 446, and Trem. Pl. Cor. 461, where see forms of writs and return. See tits. "Company," "Franchise," "Freedom," "Freemen," "Office" (Admission).

LIVINGS.] *Inspection of Register.*—The writ will be granted to command a bishop to allow inspection of his register of presentations and institutions *to livings in his diocese, and to allow copies to be [*147] taken of them by a person claiming a right of patronage; application for such inspection and copy having been made previously and refused: and this, although the bishop also claim a right to collate to such living. For a bishop's register of institutions, &c. is kept for the use of all persons claiming title to livings in the diocese, and therefore being for the benefit of the public at large, it is of a public nature; and thus, unlike the books of a corporation, which are kept for the use of the body at large, or that of the individual members, and not for the use of strangers; so also of parish books. Such registers ought, therefore, to be accessible to every individual who has, or who can by possibility claim title to the presentation to a living with the diocese.(f)

LOANS FOR CHURCHES.] See tit. *Church (Loan)*.

LOANS FOR PARISHES.] See tits. *Parish (Loan)*.

LONDON.] See titles *City Works, (Clerk of)*; *Courts Inferior (Lord Mayor's Court, Requests, &c.)*.

LORD MAYOR'S COURT.] See titles *Attorney*; *Courts (Inferior)*.

LUNATIC.] *Removal, &c.* The writ lies to command the hearing of an appeal against an order adjudicating the settlement or removal of a pauper lunatic,(g) or against an order for the payment of money for the care and guardianship of a pauper lunatic.(h)

MACE.] See titles *Borough*; *Corporation Municipal (Insignia)*; *Insignia*; *Mayor*.

MANDAMUS.] The writ lies to enforce the result of a previous mandamus. Thus, where a compensation jury having met and assessed compensation in pursuance of a mandamus, the Court, upon payment being re-

(f) R. v. Ely (Ep.), 8 B. & C. 112.† S. C. 2 M. & R. 127. R. v. Staffordsh. (J.), 6 A. & E. 89.† Southampton (Mayor) v. Graves, 8 T. R. 590. May v. Gwynne, 4 B. & A. 301. Cox v. Copping, Ld. Raym. 337. Bac. Abr. tit. "Man." (D.) See tits. "Books," "Company," "Corporations Municipal" (Books, &c.), "County," "Manor" (Rolls, &c.), "Parson."

(g) R. v. Kent (J.), 2 Q. B. 686.† S. C. 2 G. & D. 152. S. C. 11 L. J., N. S. 26, M. C. R. v. West Riding (J.), 15 L. J., N. S. 52, M. C. R. v. Radnorsh. (J.), 15 L. J., N. S. 151, M. C. R. v. York (Recorder), 4 D. & L. 376. S. C. 16 L. J., N. S. 22, M. C. R. v. West Riding (J.), 16 L. J., N. S., M. C. 171, where see form of writ. See tits. "Poor," (Removal, Appeal), "Quarter Sessions" (Appeal).

(h) R. v. Middlesex (J.), 16 L. J., N. S., 104, M. C. See tit. "Poor" (Relief, &c., Costs).

fused, granted a mandamus to command it.(i) But a mandamus will not lie for *the costs of a former mandamus if there be a specific statutory remedy for such costs.(j) [*148]

MANOR.] This most important and extensive subject is arranged as follows :—

MANOR.				MANOR.			
1st. Court Leet	-	-	148	4th. Bailiff	-	-	153
Holding Court	-	-	148	5th. Custom	-	-	153
Jury	-	-	149	6th. Licenses	-	-	153
Business of Court	-	-	149	To demise	-	-	153
Appointing officers	-	-	149	To dig earth	-	-	153
Presentments	-	-	150	7th. Admittance	-	-	154
Plaint	-	-	150	Jurisdiction of B. R.	-	-	154
Resiant	-	-	150	When granted	-	-	155
Oath of allegiance	-	-	151	When refused	-	-	157
Records of Court	-	-	151	Royal manor	-	-	157
Inspection, &c.	-	-	151	Fines	-	-	158
Officers of Court	-	-	151	Application for writ	-	-	158
Steward	-	-	151	Affidavits	-	-	158
Admission	-	-	151	Rule	-	-	158
Restoration	-	-	151	Form of writ	-	-	158
2nd. Court Baron	-	-	151	Returns	-	-	159
Holding Court	-	-	151	8th. Surrender	-	-	159
Business of Court	-	-	152	Application for writ	-	-	161
Presentments	-	-	152	Rule	-	-	161
Officers of Court	-	-	152	Form of writ	-	-	161
Steward	-	-	152	Returns	-	-	161
Swearing In	-	-	153	9th. Court Rolls	-	-	161
Restoration	-	-	153	Delivery	-	-	161
3rd. Court Copyhold	-	-	153	Inspection	-	-	161
Officers of Court	-	-	153	Application for writ	-	-	163
Steward	-	-	153	Rule	-	-	164

—.] 1st. *Court Leet. Holding.*—The stat. 11 Geo. 1, c. 4, provides in certain cases, a remedy by mandamus, where the lord neglects to hold a Court, or where something is wrongly done or omitted at such a Court when holden.(k) But generally as the holding of a Court Leet, for all purposes, is for the public good, it having been instituted for the more convenient distribution of public justice, the Court of B. R. will, when necessary, grant a mandamus to command the holding of such a Court *forthwith*,(l)

(i) *R. v. Nottingham Waterworks*, 6 A. & E. 335.† S. C. 1 N. & P. 480.† See tits. "Compensation" (Payment), "Execution," and ante, p. 10, 23.

(j) Note (i), supra. See tits. "Company" (Execution), "Costs." See ante, p. 58, n. (f).

(k) See stat. App. *R. v. Montacute (Ld.)*, 1 W. Blac. 60, n. (a). S. C. 1 Wils. 283. See tits. "Corporation Municipal" (Duties, &c.), "Courts Inferior" (Holding Courts), and ante, p. 10.

(l) 1 W. Blac. 63. S. C. 1 Wils. 283. supra. *R. v. Milverton (Manor)*, 3 A. & E. 284.† S. C. 1 H. & W. 282. Seriven on Copyhold, 532, n. (g). *R. v. Colebrooke*, 2 Ld. Ken. 163. See tits. "Corporation" (Municipal), "Courts Inferior" (Holding Courts). As to nonuser of Courts, see ante, p. 108, and infra, "Plaint," "Court Baron."

[*149] it being *clear that the Court of B. R. has a competent jurisdiction for such purpose.(m) Thus it will be granted to command a municipal corporation to permit and allow the holding of a Court Leet in their Corporation Hall, such being the accustomed place, by immemorial usage and prescription;(n) and for that purpose will command a delivery to the lord of the manor, of the key of the town hall,(o) notwithstanding the lord be not legally obliged to hold his court therein.(p) Thus, where the bailiffs and burgesses of an ancient borough, had been time immemorially lords of the manor and owners of the guildhall within the borough; and by their charter power was granted to them to hold manor Courts in the guildhall twice in every year, as of ancient time; which, until 1807 had been immemorially so held. In 1807, certain commissioners, under an inclosure act, awarded to the prosecutor, all the said manor, with the rights, members, courts, view of frankpledge, &c., *excepting to the bailiffs and burgesses the guildhall, &c.* The prosecutor, until 1821, had held the Courts Leet in the guildhall, and being then obstructed, the Court granted him a writ of mandamus to command the bailiffs and burgesses, to allow the manor Courts to be held therein.(q)

—.] —. *Jury.*—So a mandamus will be granted to command the attendance of the tenants of a manor, at the Court Leet, to make a jury.(r) Yet it lies not to the jurors, by name, to appear and form a jury.(s) But on the other hand, members of a municipal corporation, if they be entitled, may have granted to them a mandamus to be summoned on the jury of a Court Leet.(t)

—.] —. *Business of Court; Appointment of Officers, &c.*—The writ will also be granted to command the steward of a Court Leet to do at such Court any act within his jurisdiction, and to transact the business thereof;(u) as to *appoint* any or all of the *necessary officers*,

(m) Ante, p. 11, 12, 93, 108. R. v. Milverton (Manor), 3 A. & E. 284, 286.† R. v. Willis, Andr. 279, and the argument there. S. C. 7 Mod. 261. R. v. Grantham (Corp.), 2 W. Blac. 716. R. v. Ilchester (Bailiffs), 2 D. & R. 724.† S. C. 4 D. & R. 326.† S. C. 2 B. & C. 764.†

(n) 2 W. Blac. 715; 2 D. & R. 725.† S. C. 4 D. & R. 326. S. C. 2 B. & C. 764,† supra. R. v. Montacute (Lord), 1 W. Blac. 64, n. (l). S. C. 1 Wils. 283. Com. Dig. tit. "Man." (A.) Scriv. on Copyh. 732, n. (g), 4th edit. See ante, tit. "Custom," and infra, "Court Baron."

(o) R. v. Wigan (Mayor), T. 17 Geo. 2, 1 Wils. 76, cited in 2 D. & R. 725.† S. C. 4 D. & R. 324.† S. C. 2 B. & C. 764,† supra. See tit. "Keys."

(p) 2 B. & C. 764,† supra.

(q) R. v. Ilchester (Bailiffs), 2 D. & R. 724.† S. C. 4 D. & R. 324.† S. C. 2 B. & C. 764.†

(r) Wigan's case, Str. 1207. S. C. 1 Wils. 76. R. v. Montacute (Lord), 1 W. Blac. 64, n. (l). S. C. 1 Wils. 283. Com. Dig. tit. "Man." (A.) See tits. "Jury," "Inquest."

(s) R. v. Bankes, 1 W. Blac. 451, 452. S. C. Burr. 1452; 1 W. Blac. 64, n. (l), supra. Bac. Abr. tit. "Man." (D). Com. Dig. tit. "Man." (A).

(t) Ante, p. 27, 28. R. v. Grantham (Corp.), 2 W. Blac. 715. R. v. Willis, Andr. 279. Wigan's case, Str. 1207. Com. Dig. tit. "Man." (A.)

(u) Cited in R. v. London (Ep.), 1 Wils. 14. See tits. "Corporation" (Municipal), p. 93, "Courts" (Inferior), and see ante, p. 11.

usually and legally appointed *thereat.(v) So it has been granted to command the lord of a manor to hold a Court Leet, and to [150] summon a jury to attend thereat, in order to elect a mayor.(w)

—.] *Presentments*.—The writ has also been granted in pursuance of stat. 11 Geo. 1, c. 4, to command the steward of a Court Leet, to hold a Court, and to charge the jury to make *proper presentments*, and that they, being sworn, may present the prosecutor of the writ, as a person duly elected mayor.(x) But it would seem to be a good return to such a writ that the prosecutor was not duly qualified, or not elected.(y)

—.] *Plaint*.—It is clearly settled that a mandamus will be granted to command the steward and suitors of a manor Court, to receive and admit a certain plaint, and issue process from the said Court thereon, and to proceed to hear and determine the same, pursuant to the manor charter, and in such case it is also clear that the nonuser of the Court, for any period of time, does not deprive the steward, &c. of the power, nor relieve him from the necessity to hold such Court, notwithstanding the words of the charter may be, literally, permissive merely, for they are, in law, obligatory; the Court having been instituted for the public benefit.(z) So it lies to command the lord of a manor and his steward to proceed upon a plaint, in the nature of a writ of right patent at the common law.(a) But a return to such a mandamus, that the Court had adjudicated (if in fact it have done so,) whether by quashing for informality or otherwise, is good, as the Court cannot, upon a return, inquire whether or not the adjudication be erroneous or informal, and thereby review it;(b) for in such case relief must be sought by a proceeding in the nature of a petition of right, or in equity.

—.] *Resiant; Enrolling and Swearing in*.—The writ lies to command the mayor and steward of a Borough Court Leet, to enrol and swear one a resiant and burgess of the borough, if thereby a right, as to vote for members of Parliament, be gained; the connection, however, between

(v) R. v. Milverton (Manor), 3 A. & E. 284, 286.† See tit. "Constable."

(w) R. v. Bankes, 1 W. Blac. 444. S. C. Burr. 1452. See stat. 11 Geo. 1, c. 4, s. 3, App. Bull. N. P. 196, 197. R. v. Willis, Andr. 279. Bac. Abr. tit. "Man." See tits. "Mayor," "Office" (Election).

(x) R. v. Willis, 7 Mod. 261. S. C. Andr. 279. Bull. N. P. 200. Clitheroe's case, Comb. 239. Com. Dig. tit. "Man." (A). See tits. "Inquest," "Mayor," "Presentment," "Portreeve."

(y) 7 Mod. 261, supra. See tit. "Churchwarden," and post, tit. "Return."

(z) See post, 96, (Bye-law). R. v. Havering (Steward), 5 B. & A. 691, where there was a nonuser for above fifty years; and see R. v. Hastings (Mayor), 5 B. & A. 692, n. (a), where there was a nonuser for above thirty years. Scriven on Copyhold, 601, 602, 4th edit. Ante, p. 108, n. (s). See tit. "Courts Inferior" (Holding Court, Plaint), where see other returns.

(a) Ante, p. 109. R. v. Old Hall (Manor), 2 P. & D. 515. S. C. 10 A. & E. 248.† S. C. W. W. & D. 650; 3 Jur. 868, where see the form of a writ and return. F. N. B. 3, E. Com. Dig. tit. "Droit," (B. 3). Scriven on Copyhold, 630, 4th edit. See tit. "Quarter Sessions" (Justices).

(b) Ante, p. 22. 2 P. & D. 515. S. C. 10 A. & E. 248,† supra. R. v. Richardson, 1 Wils. 21. R. v. West Riding (J.), 7 T. R. 467. Scriven on Copyhold, 489, 530, 531, 4th edit. See tits. "Courts Inferior" (Plaint, Judgment, &c.,) "Quarter Sessions" (Review).

[*151] the leet and *the corporation, must be shown by affidavit. So that where an inhabitant of a borough applies for a mandamus to the mayor and steward of a Borough Court Leet, to enrol him as a resident, &c., but did not make out an inchoate right in every inhabitant to be a burgess, or that any connection existed between the corporation and the Court Leet, as would make swearing and enrolment at the latter, the means of perfecting such right, the Court refused the writ.(c)

—.] *Oath of Allegiance.*—The Court will not now grant the writ of mandamus, to command the lord of a manor to hold a Court Leet for the purpose of administering the oath of allegiance, to one desirous of taking it, for he will be exempted from any penalty for not taking it, by shewing that he has offered to take it.(d)

—.] *Records of Leet; Inspection, &c.*—The Court will grant a writ of mandamus, to allow an inspection of the records of a Court Leet, if the applicant for the writ assign some satisfactory reason for inspection, and it be refused without sufficient reason.(e)

—.] *Officers of Court; Steward.*—It has been clearly settled by abundance of authority, that a mandamus will be granted for the office of steward of a Court Leet, it not being a place of mere service, but a public office, which concerns the administration of justice, he being the Judge of his Court.(f)

—.] *Admission.*—So a mandamus lies to admit to the office of steward of a leet.(g)

—.] *Restoration.*—So it lies to restore the steward of a Court Leet, if improperly deprived,(h) and this, although he is not a sworn officer.(i)

—.] *2nd. Court Baron, Holding.*—A writ of mandamus will, if the lord of a manor neglect to hold the usual Courts Baron, be granted to

(c) Ante, p. 27, 28, 54. R. v. West Looe (Mayor), 3 B. & C. 677.† R. v. Barnard's Inn, 5 A. & E. 24. Scriv. on Copyh. 713, n. (c), 4th edit. See tit. "Burgess" (Admission.)

(d) Ante, p. 15. R. v. Maidstone (Mayor), 6 D. & R. 334, 335,† per Abbott, C. J. Scriv. on Copyh. 532, n. (g), 4th edit.

(e) 6 D. & R. 334,† supra; and see cases cited 336, n. (a). Scriv. on Copyh. 532, n. (g), 4th edit. See tits. "Accounts," "Books, &c.," "Corporation Municipal" (Books, Inspection), "Courts" (Inferior), "Livings," "Quarter Sessions" (Records).

(f) Ante, p. 12. Middleton's case, 1 Sid. 169. Anon., 12 Mod. 666, Holt, C. J., saying, that he did not care to grant it for the steward of a leet. Stamp's case, 1 Sid. 40, where the Court is reported to have doubted whether it lay in such case. S. C. Ray. 12. S. C. 1 Keb. 5. R. v. Kingseleere (Churchwardens), 2 Lev. 18. Hurst's case, 1 Keb. 354. R. v. Raines, 3 Salk. 233, 11, 13. Anon. 1 Freem. 21. The Protector v. Craford, Sty. 457. See Anon., 12 Mod. 666. See Scriven on Copyhold, 527, 608, 703, 704; 2 Sid. 112; Bac. Abr. tit. "Man." (C). See tit. "Office."

(g) Stamp's case, Raym. 12. S. C. 1 Sid. 40. S. C. 1 Keb. 5. See R. v. Cambridge (V. C.), Burr. 1649. See tit. "Office" (Admission).

(h) Stamp's Case, 1 Sid. 40. S. C. Raym. 12. S. C. 1 Keb. 5. Middleton's case, 1 Sid. 169; Com. Dig. tit. "Man." (A.); 1 Sid. 169, approved in 2 T. R. 183, n. He's case, 1 Vent. 153, per Twisden, J. Scriven on Copyhold, 527, 608, 703, 704. See tit. "Office" (Restoration).

(i) Per Glyn, C. J. City Works case, 2 Sid. 112. See also Sty. 457, supra. See tit. "Office" (Sworn Officer).

*command him to hold them, and to do justice to his tenants.(j) So it lies to command a corporation, to allow a lord and steward of [*152] a manor to hold a Court, in their corporation hall, he being entitled so to do, that being the accustomed place by immemorial usage and prescription.(k)

—.] *Business of Courts; Presentments.*—The writ lies to command the lord and steward of a manor, and certain persons being homagers, (who in such case are merely ministerial officers), to hold a Court Baron, and present certain conveyances of the purchasers of burgage tenements, whereby they are entitled to be sworn in burgesses of the corporation, and to vote for members of Parliament, &c., notwithstanding it do not appear whether such conveyances be legal or not, or they be even charged to be fraudulent. The affidavits should shew that the several conveyances are duly executed, and that they have been offered at a general Court to be presented, but have been refused by the homage. If, however, there have not been an alienation, or the conveyances be illegal, either fact will form matter of return to the writ.(l)

—.] *Officers of Court; Steward.*—It seems, from a long current of authorities, that the writ of mandamus does not lie for the office of steward of a Court Baron, because it is a place of mere private jurisdiction, and does not concern the administration of justice.(m)

There are however, a few dicta which have, probably, through the mistake or ignorance of the reporters, crept into some of the cases, but it is apprehended, they are not of sufficient weight to impugn the above doctrine, that the writ will *not* lie.(n). It has however, been held, that if the steward be *not at will only, but has a patent for life, that in such [*153] case the writ will lie.(o)

(j) Ante, p. 11, 105. Old. Nat. Br. 3, e, 12 b., p. 6, 26, 8th edit., 4to. R. v. Montacute (Lord), 1 W. Blac. 63, 64. S. C. 1 Wils. 283; 2 Roll. 107, per Montague, C. J. R. v. Surrey (J.), 2 Show. 74, n. (d), 3rd edit. See supra, "Court Leet," infra, "Admittance," "Surrender," and ante, tit. "Courts Inferior."

(k) R. v. Grantham (Corp.), 1 W. Blac. 715; 1 W. Blac. 64, n. (l). S. C. 1 Wils. 283, supra. See supra, "Court Leet," and ante, tit. "Custom."

(l) Ante, p. 55. R. v. Montacute (Lord), 1 W. Blac. 60. S. C. 1 Wils. 283. Clithero's case, Comb. 239. Com. Dig. tit. "Man." (A). See tits. "Burgess," "Presentment," "Vote."

(m) Stamp's case, 1 Sid. 40; this was a judgment of a full Court. S. C. Raym. 12. S. C. 1 Keb. 5, where, per Twisden, J., "that in Trafford's case it was expressly adjudged, that a mandamus would not lie for the steward of a Court Baron solely. See R. v. Lee, 1 Show. 252. S. C. 3 Lev. 309. S. C. 3 Mod. 334. R. v. Kingscleere (Churchwardens), 2 Lev. 18. Middleton's case, 1 Sid. 169. Hurst's case, 1 Keb. 354; Fitzg. 194, 195; Holt, 442; Seriven on Copyhold, 526, 527, 608. Speaker v. Styant, Comb. 127, per Eyres, J. Anon., 12 Mod. 666. See supra "Leet Steward," Bac. Abr. tit. "Man." (C). See tit. "Office."

(n) Thus in Isle's case, 2 Keb. 820, Hale, C. J., "conceived a mandamus would lie for steward of a Court Baron being register, though no Judge;" and see S. C. 1 Vent. 153, per Hale, C. J. In Anon., Freem. 21, Hale, C. J., is made to say, "that the writ will lie for the steward of a Court Baron," but upon reference to a concurrent report of the same case, 2 Lev. 18, the same Judge is made to say it will not lie, which is also confirmed by the authorities cited in the margin of the report in Freem.; also see The Protector v. Craford, Sty. 457, per Glyn, C. J. Bac. Abr. tit. "Man." (C).

(o) Per Hale, C. J., 2 Lev. 18. Com. Dig. tit. "Man." (A. B.)

—.] *Swearing in*.—The writ does not lie to command the swearing in of the steward of a Court Baron.(p).

—.] *Restoration*.—Neither does the writ lie to command a restoration of the steward of a Court Baron to his place.(q)

—.] 3rd. *Copyhold Court ; Officers of Court ; Steward*.—It has been decided by one case, that a mandamus does not lie to swear in a steward of a *copyhold* Court, he being a mere private officer to do service for the lord.(r)

—.] 4th. *Bailiff*.—It appears that this writ will not be granted at the instance of a bailiff of a manor,(s) who seems originally to have been a very inferior officer, and appointable by parol.

—.] 5th. *Custom*.—It would seem that a mandamus will be granted to command the tenants of a manor to present a memorial custom.(t)

—.] 6th. *Licenses*.—No instance can be found of a mandamus having been granted to command the lord of a manor, under any circumstances, to grant a license for the doing of any particular act, for the word “license” *ex vi termini* imports “discretion,”(u) which cannot be interfered with by mandamus.

—.] — to *demise*.—So the writ does not lie to command the lord of a manor to grant a license to a copyholder, to demise his copyhold for a term of years on an alleged custom, that the tenant may demise for three years without license, and that for a license to demise for a longer period of time, the lord shall have a sum certain for every year of such extended period.(v)

—.] — to *dig brick earth*.—The writ has been held to lie to command* the lord of a manor to grant a *customary license*, as for [*154] a tenant to dig brick earth for the purpose of making bricks on payment of a sum certain. Yet if there be no such custom, but evidence

(p) Steward's case, Comb. 127, per Eyres, J.; Holt, 442. See tit. “Office” (Swearing in).

(q) Stamp's case, 1 Sid. 40; this was the judgment of a full Court. S. C. Raym. 12. S. C. 1 Keb. 5, where, per Twisden, J., “that in Trafford's case it was expressly adjudged, that a mandamus would not lie for the steward of a Court Baron merely.” See R. v. Kingsleere (Churchwardens), where Hale, C. J., said, “that it lay to restore the steward of a Court Baron, if he be not at will merely, because he is an officer of justice. R. v. London (Mayor), 2 T. R. 182, n. (b), citing 3 Lev. 309. See Anon., 12 Mod. 666; Fitzg. 194, 195. He's case, 1 Vent. 153. Scriven on Copyhold, 526, 527, 607. See tit. “Office” (Restoration).

(r) Anon., 12 Mod. 666. 5 Com. Dig. tit. “Man.” (A. B.) See Scriv. on Copyh. 608, n., where it is called a *customary* Court. See supra, “Steward of a Court Baron.” See tit. “Office” (Public).

(s) Bailiff's case, Comb. 133; this case is not noticed in Scriven on Copyhold. See Scriv. Cop. 122, 4th edit. See tit. “Office.”

(t) Ante, p. 150, 152. R. v. Montacute (Id.), 1 W. Blac. 60. S. C. 1 Wils. 283. See also tits. “Custom,” “Presentment,” infra, “Admittance,” “Customary License,” “Surrendered.”

(u) Ante p. 12, 13. See tit. “Discretion.” R. v. Dr. Hale, 1 P. & D. 297. S. C. 9 A. & E. 339, 342.† See Grove v. Bridges, cited by Moreton, J., in Porphyry v. Legingham, 2 Keb. 344. S. C. cited. in Gilb. Ten. 294. Scriven on Copyhold, 456, 4th edit. See tits. “License.”

(v) 9 A. & E. 339.† S. C. 1 P. & D. 293, supra. Scriv. on Cop. 456, 4th edit.

merely, that licenses had frequently been granted by the lord on payment of a sum certain for each acre, the writ will be refused.(w)

—.] 7th. *Admittance ; Jurisdiction of B. R.*—It is but within a recent period, that the Court of B. R., first(x) granted the writ of mandamus to command admission to a customary or copyhold tenement ; before which period, any person who wished to compel his admission was, as against a subject, obliged to proceed by bill in equity,(y) and as against the Crown, the remedy was as it now is, by petition of right, *monstrans de droit*, or traverse of office, according to the nature of the case.(z)

The writ does not appear to have been granted for this purpose prior to the year 1772 or 1773 ;(a) the first case in which the jurisdiction of the Court in this particular is clearly recognised, being that of *R. v. Rennett*,(b) in which (although its main point has been since expressly overruled), the Court held, that in a proper case they would command the lord of a manor to admit a copyholder ; it having been previously solemnly determined,(c) that a mandamus lay to command the homage of a manor to present certain conveyances ; which amounted perhaps to the same thing as a mandamus to admit.(d)

The right of the Court of B. R. to thus assume a jurisdiction, and to grant the writ in this and similar cases, has been much questioned in equity.(e) But Lord Ellenborough, C. J., has upon this point(f) said, that he was aware that the power of his Court to grant a mandamus to admit to a copyhold had been questioned on the other side of the Hall, yet the Court having for many years past being in the habit of granting such writs on a sufficient *prima facie* or colourable title being made out, on the part of the person applying ; he could not doubt its power in that respect.(g) Other Judges of the same Court, have however, often expressed a regret that the Court of B. R. ever interfered in these cases.(h)

(w) Ante, p. 105. *R. v. Dr. Hale, &c.* 1 P. & D. 293. S. C. 9 A. & E. 339,† n. (u) ; the period of time during which the licenses had been granted was more than a century. *Scriven on Copyhold*, 458, n. (s), 532, 533, 4th edit. See tit. "Custom."

(x) A regret has, however, often been expressed by the Judges, that the Court has ever interfered by mandamus in cases of admission. *Infra*, n. (h).

(y) Post, p. 155, n. (k), 157, n. (v).

(z) See tit. "Patent." A mandamus does not lie for admission to a tenement within a royal manor, 4 P. & D. 723. S. C. 1 Q. B. 352.† S. C. 10 L. J., N. S. 148, Q. B., *infra*. And see *Scriven on Copyhold*, 531, and n., 4th edit. See *infra*, "Royal Manor."

(a) Anon., Lofft, 390, H. 14 Geo. 3.

(b) H. 28 Geo. 3 ; 2 T. R. 197. Anon., Lofft, 390.

(c) *R. v. Midhurst (Borough)*, M. 24 Geo. 2, 1 Wils. 283. S. C., 1 W. Blac. 60. See ante, p. 12, and tit. "Corporation Municipal" (Duties, &c.)

(d) *R. v. Pitt*, 10 A. & E. 279.† S. C. 2 P. & D. 391. See tit. "Presentment," and *supra*, p. 152, n. (f).

(e) 3 Ves. Jun., 752, 4, *Williams v. Lord Lonsdale*. See ante, p. 22.

(f) *R. v. Coggan*, 6 East, 431.

(g) *Ree d. Conolly v. Vernon*, 5 East, 51, and cited 6 East, 430, n. (a). See 1 *Scriven on Copyholds*, 525, 527, 4th edit.

(h) *Supra*, n. (x).

[*155] *But notwithstanding all that has been said, it is clear that the Court of B. R. has jurisdiction by mandamus in cases of admission, &c., and will now on a proper case grant the writ for such purpose,⁽ⁱ⁾ whether the applicant claim by descent or by purchase.—As to admission in pursuance of a surrender, see *infra*, *Surrender*.

—.] *When granted*.—Before the jurisdiction of the Court of B. R. as to admission, &c., was fully devolved, such Court always refused the writ of mandamus for the purpose of commanding the admittance of those who claim by descent from the deceased tenant,^(j) both because there was a remedy in equity,^(k) and also, that they might enter, do every other act before admittance; and in fact, had a complete title without it against all the world but the lord.^(l)

During later years however, it has been the constant habit of the Court to grant the writ to those who claim by descent; the case of *Rex v. Rennett*,^(l) which decided otherwise, having been overruled upon this point. The reasons upon which this doctrine, that an *heir at law* is entitled to a writ to command his attendance is founded, are, that although he has a good title against every one, but the lord, yet he has a right to insist upon admittance, in order to make him a complete copyholder, for he may wish to be put upon the homage, or to be put in nomination for various offices, or to surrender to the use of his will.^(m) Thus coparceners, although they claim by descent, are entitled to have granted to them a writ of mandamus to command their admittance, and it would seem that as they, however many, make in law but one tenant and one heir, they must be admitted upon payment of one set of fees only.⁽ⁿ⁾

The Court has also granted a mandamus for the admission of an heir, [*156] *where the ancestor through whom the heir claimed had died before admittance, thus deciding the principle that the Court will

(i) *R. v. Oundle* (Mayor), 1 A. & E. 283,† where see a form of writ. *R. v. Everdon* (Manor), 16 L. J., N. S. 18, Q. B. *R. v. Hendon* (Manor), 2 T. R. 484; 6 East, 431; 3 B. & C. 172;† Bac. Abr. tit. "Man." C. See post, p. 156.

(j) *R. v. Rennett*, 2 T. R. 197, cited in *R. v. Bonsall* (Manor), 3 B. & C. 173,† S. C. 4 D. & R. 82,† and in *R. v. Coggan*, 6 East, 431. *R. v. Montacute* (Ld.), 1 W. Blac. 64, n. (l): 1 Wils. 283. S. C. 3 Mod. 334, n. (c) See 10 A. & E. 279,† per Littleale, J. See Scriven on Copyhold, p. 527, 528, 4th edit. As to Fines see *infra*, p. 158.

(k) Ante, p. 22; 2 T. R. 198, *supra*; Litt. 66, 67. *Ford v. Hoskins*, Cro. Jac. 368; 1 Roll. Abr. 198. *R. v. Pitt*, 10 A. & E. 279,† per Littleale, J.

(l) 2 T. R. 198, *supra*. *R. v. Hendon* (Manor), 2 T. R. 484.

(m) Ante, p. 12. *R. v. Brewers' Company*, 3 B. & C. 172, 173,† S. C. 5 M. & R. 140, 153. S. C. 4 D. & R. 492,† *R. v. Bonsall* (Manor), 3 B. & C. 173,† S. C. 4 D. & R. 825,† per Abbott, C. J. *R. v. Wilson*, 10 B. & C. 80, 87,† S. C. 5 M. & R. 140, where see form of writ. See *Right v. Banks*, 3 B. & Ad. 668,† *R. v. Hexham* (Manor), 1 N. & P. 53,† S. C. 5 A. & E. 562,† *Doe d. Hamilton v. Clift*, 12 A. & E. 575,† *R. v. Coggan*, 6 East, 431, 432. *Doe d. Le Keux v. Harrison*, 6 Q. B. 636,† S. C. 14 L. J., N. S. 77, Q. B. But in these cases the dispute was not between the heir and a mere stranger, but with the lord. *R. v. Bonsall* (Manor), 3 B. & C. 173,† S. C. 4 D. & R. 825,† per Abbott, C. J. See post, p. 159.

(n) *R. v. Bonsall* (Manor), 3 B. & C. 173, 175,† S. C. 4 D. & R. 825,† and see *Wilson v. Hoare*, 4 A. & E. 239;† 1 M. & K. 456. See *R. v. Everdon* (Manor), 16 L. J., N. S., Q. B. 18. As to several fines of tenants in common. See *infra*, tit. "Fines."

command the lord to admit one who has a *prima facie* legal title, in order to enable him to try his right; and though equity may have refused to compel the lord to admit him for want of his shewing an equitable right to the property, (as where the heir of a trustee seeks admittance the *cestui que trust* having died without heirs,) but in such a case, if there be a claim of a previous fine due to the lord in respect of the ancestor, through whom the party claims, the rule will only be granted on payment of such fine or fines as shall be due.(o)

But if an heir apply to the Court for a *mandamus* to admit, &c., with a view to try his title to a copyhold tenement, as against a stranger, the Court will in its discretion refuse the writ for such purpose; for, in relation with the stranger he has no title but the bare admittance and the payment of the fine to the lord.(p)

But in a more recent case, the Court on the application of the heir, who claimed also as devisee, granted the writ although he claimed adversely to a third party, the Court stating, that upon principle the writ ought to go, and that the fact that there are two claimants by different titles does not operate so as to conclude the application for the *mandamus*; for the lord should and must admit both.(q)

The aid of the Court of B. R. in favour of a customary heir was carried to its fullest extent in a case, the short outline of which is this, a tenant in fee of copyhold tenements surrendered to the use of his will, and devised them to A. for life, remainder to B. for life, remainder to his own right heirs. The devisees disclaimed, and it was held, that on the death of the testator, the estate descended to his heir, and that as the devisees would not come in and be admitted, he was entitled to admittance, and that whether the disclaimer by the devisees were or were not made in furtherance of a scheme to defeat the lord's right to fines.(r)

The Court will also grant the writ to command the admittance of a *devisee*,(s) notwithstanding the heir at law claim adversely, for the admittance is no title of itself, nor does it prejudice an adverse title.(t)

*So the writ lies to command an admission by the lord, in pursuance of a legal surrender. For the tenant is by admittance [*157]

(o) Ante, pp. 27, 28. *R. v. Coggan*, 6 East, 430; 2 T. R. 197, supra. See Scriven on Copyhold, 408, 4th edit.

(p) Ante, pp. 27, 28. *R. v. Brewers' Company*, 3 B. & C. 172.† S. C. 5 M. & R. 110, 153. S. C. 4 D. & R. 492.† *R. v. Bonsall (Manor)*, 3 B. & C. 173.† S. C. 4 D. & R. 825.† per Abbott, C. J. See post, tit. "Application."

(q) See ante, 72, n. (c), post, n. (t). *R. v. Hexham (Manor)*, 1 N. & P. 53.† S. C. 5 A. & E. 559,† and see *Mason v. Day*, Gilbert's Equity Cases, and *R. v. Wilson*, 10 B. & C. 80,† and see 3 B. & C. 172.† S. C. 5 M. & R. 140, 153. S. C. 4 D. & R. 492.† See supra; and see Scriven on Copyhold, 525, 4th edit.

(r) *R. v. Wilson*, 10 B. & C. 80.† S. C. 5 M. & Ry. 140, 153; and see *R. v. Southwood*, 5 M. & Ry. 416. Scriven on Copyh. 528, 4th edit.

(s) Anon. Loft. 390. *R. v. Wilson*, 10 B. & C. 80, 87.† S. C. 5 M. & Ry. 140.

(t) Supra, n. (q). Anon. Loft. 390. See Coke's Complete Copyholder. *R. v. Agarsdley*, 5 D. 19. *R. v. Hexham (Manor)*, 5 A. & E. 559.† S. C. 1 N. & P. 53.† *R. v. Southwood*, 5 M. & Ry. 416. See p. 72 (*Lis pendens*). And see post, tits. "Application," "Peremptory Writ" (Effect).

only, according to the quality of his estate in his true right; and the lord through his steward is only an instrument of custom to convey that right.(u)

—.] —. *When refused.*—The Court will refuse to grant the writ to command an admission in any case where such admission is unnecessary; or where the Court of Chancery has interfered, and is competent to give full relief;(c) or where the prosecutor may bring ejectment and try his title before admission.(w) Nor will the Court interfere in favour of an applicant whose claim has been shewn to be bad by his acquiescence in the adverse verdict of a jury.(x)

Also, as the title of the prosecutor to admission must be a complete legal one, so if it be barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 27, or be otherwise defective, the court will refuse to assist him by granting the writ.(y) So if the applicant be cestui que trust merely, the legal estate appearing on the Court rolls to be in the trustees.(z) Nor will the Court enforce an admittance, if felony have been committed by the surrenderee before admittance, for thereby the estate escheats to the lord.(a)

—.] —. *Royal Manor.*—The writ does not lie to command the admission of a customary tenant of a royal manor; (notwithstanding the steward thereof receive his appointment from the Commissioners of Woods and Forests, under stat. 10 Geo. 4, c. 50, s. 14, for such statute does not divest the Crown of the legal estate);(b) for the reason that the Sovereign, as lord or lady of the manor, is not subject to the writ.(c). That this is settled law cannot be doubted; both because there would be an incongruity for the Sovereign to command itself to do an act, and also, that obedience to such a writ is to be enforced by attachment. Therefore notwithstanding

(u) Ante, p. 12. Anon. Loft. 390. R. v. Oundle (Manor), 1 A. & E. 283.† S. C. 3 N. & M. 484.† R. v. Powell, 1 Q. B. 355.† R. v. Willis, 3 B. & A. 510.† R. v. Oundle (Manor), 1 N. & M. 586.† R. v. Hendon (Manor), 2 T. R. 484. R. v. Stafford (Marquis of), 7 East, 521. R. v. Mildmay, 5 B. & Ad. 254.† S. C. 2 N. & M. 778.† R. v. Bonsall (Manor), 4 D. & R. 825.† S. C. 3 B. & C. 173.† R. v. Midhurst (Borough), 1 Wils. 283. S. C. nom. R. v. Montacute (Ld.), 1 W. Blac. 60, and see p. 64, n. (l). See supra, "Admittance," and infra, "Surrender."

(v) Ante, pp. 15, 22. R. v. Pitt, 10 A. & E. 272.† S. C. 2 P. & D. 285. See infra.

(w) Ante, p. 18—21; 5 D. 19, supra, citing R. v. Rennett, 2 T. R. 197, which case, it was insisted, was not overruled by R. v. Brewers' Company, 3 B. & C. 172,† according to the report of that case in 4 D. & R. 492,† but see ante, p. 155, n. (l).

(x) Ante pp. 27, 28. R. v. Agarsdley (Manor), 5 D. 20, citing R. v. Bonsall, 3 B. & C. 173.† S. C. 4 D. & R. 825;† and see Widdowson v. Harrington, 1 Jac. & Walk. 542, and note to 1 Watk. Copyh., 4th edit. 297.

(y) Ante, pp. 27, 28. Ex parte Philips, 1 H. & W. 660. R. v. Agarsdley (Manor), 5 D. 19.

(z) Ante pp. 27, 28; Selw. N. P. "Man." 1102. See tit. "Equitable Right."

(a) Ante, pp. 27, 28. R. v. Mildmay, 5 B. & Ad. 254,† S. C. 2 N. & M. 778;† and see post, tit. "Application."

(b) Ante, p. 154, n. (x). R. v. Powell, 4 P. & D. 719. S. C. 1 Q. B. 352.† S. C. 10 L. J., N. S. 148, Q. B. See tits. "Crown," "Customs," "King," "Queen."

(c) See "Application," "Rule," infra, and see tits. "Crown," "Customs." See post, tit. "Application."

ing *proceedings by mandamus are according to the general course of practice, yet, as such a writ for admission to a tenement parcel [*158] of a royal manor cannot be granted, except against both the Sovereign and the steward, so it cannot go against the steward alone, (d) for the reason that the interests of the lord ought to be protected; it is not because the manor happens to be a royal one, that the Crown is to be excluded from the benefit of that protection, for its interests are to be as much guarded as those of a subject: and that whether the Sovereign take the profits of the manor to his own use, or whether they be appropriated to the public service, as they now are by stat. 10 Geo. 4, c. 50. (e)

—.] —. *Fines*.—If the lord refuse to admit the person to whom a copyhold is surrendered, on account of a disagreement respecting the fine to be paid, the Court will grant a mandamus to command him to admit without examining the right to the fine, for no right to it can arise till admittance. (f) But if there be a claim of a previous fine due in respect of the ancestor, through whom the prosecutor claims, the rule in such case will only be granted on payment of such fine or fines as shall be due. (g)

—. *Application for Writ; Affidavits*.—The application for a writ to command admission, &c., should be supported by affidavits setting out the pedigree of the prosecutor, if necessary; at all events, his title to the lands, &c. to which admission is sought, must be indefeasible and good, (h) and should appear on affidavit. Such application must be made against both the lord of the manor and the steward, and not against the latter only. (i)

—. *Rule*.—The lord must, as well as the steward, be made a party to the rule. (j)

—. *Form of Writ; Direction*.—A mandamus to admit to a copyhold tenement must not be directed to the steward alone, the lord must be joined with him, and if not, the writ will be defective in substance; (k) it must therefore, be directed to the lord and steward jointly, for thereby the

(d) R. v. Whitford, 7 D. 709. S. C. 1 Q. B. 355; † and see 4 P. & D. 721. S. C. 1 Q. B. 352, † supra; and see R. v. Oundle (Manor), 1 A. & E. 283; † 3 N. & M. 484; † 1 N. & M. 586. † See Rogers v. Jones, 5 D. & R. 484; † where the writ was to inspect the rolls merely.

(e) 4 P. & D. 721. S. C. 1 Q. B. 352, † supra, p. 157, n. (b), (c).

(f) R. v. Hendon (Manor), 2 T. R. 484. R. v. Montacute (Ld.), 1 W. Blac. 64, n. (f). S. C. 1 Wils. 283. Dow. v. Golding, Cro. Car. 196. As to fines of coparceners, see supra; as to those of surrenderees, see infra, p. 160.

(g) Ante, p. 155, 156. R. v. Coggan, 6 East, 431. See post, p. 161, n. (b).

(h) 5 D. 19, and see ante, p. 27, 28, 157. See post, tit. "Application."

(i) R. v. Powell, 4 P. & D. 722. S. C. 1 Q. B. 352, † See ante, p. 158. Scriven on Copyh. 531, 4th edit. See post, tit. "Application."

(j) Ante, p. 158. R. v. Whitford (Manor), 1 Q. B. 355, † S. C. 7 D. 709, and cases there cited. See post, tit. "Rule."

(k) Ante, p. 158. R. v. Powell, 4 P. & D. 719, 721. S. C. 1 Q. B. 352, † R. v. Whitford, 7 Dowl. 709. R. v. Coggan, 6 East, 431. Harris v. Jay, 4 Rep. 30 a. There are, however, some cases to the contrary, but the objection was either not raised, or was waived. Holroyd v. Beare, 2 B. & A. 473, 550. R. v. Rennett, 2 T. R. 197. See tit. "Writ" (Direction).

interests of the lord are more effectually protected. *(l)* Nor will the writ be [*159] granted to command the steward of a manor to accept a surrender into the hands of the lord according to custom, unless the lord be made a party to the rule. *(m)* The above rule is not limited to cases where the lord of a manor is a subject, but also, for the reason above given, to cases where the manor is a royal one, although there can be no mandamus to the Sovereign. *(n)*

—.] *Returns.*—The return to a writ of mandamus for the admission of an heir must deny (if it be intended to rest the defence upon that ground) the fact that the prosecutor is heir; for if it do not do so expressly, but only argumentatively, it will be bad for uncertainty. *(o)* and a peremptory writ will be awarded. The defendant may also traverse all or any of the suggestions of the writ.

—.] *8th. Surrender.*—The writ also lies to command the lord and steward of a manor to hold a Court and receive certain customary surrenders, *(p)* either of the whole or of a portion of the copyhold lands, or of a portion or of the whole of a tenant's interest. *(q)* But the surrenders should be accurately prepared, and such as the steward is bound to receive, *(r)* otherwise the Court will not interfere; neither will it interfere if the case be properly the subject of litigation in Chancery. *(s)*

The writ has been granted to command the lord, &c. to receive and examine a surrender of a copyhold tenement within his manor, which it is his duty to receive and examine according to a special custom. *(t)* But the Court will not command the lord, &c. to accept a surrender of certain customary or copyhold tenements from his tenant, for the purpose of carrying into effect the provisions of stat. 11 Geo. 4 and 1 Wm. 4, c. 60, s. 8, for the Court of Chancery can compel the performance of whatever may be requisite, and in such a case is better able than the Court of B. R. to regulate the rights of the parties. *(u)* And as the Court of Chan-

(l) R. v. Evans, 1 Q. R. 352.† R. v. Midhurst, *supra*, is an early instance of a mandamus to the lord, "or his steward."

(m) R. v. Evans, 1 Q. B. 355,† n., 1 A. & E. 283.† 2 T. R. 484. R. v. Whitford (Manor), 7 D. 709. *Supra*, p. 158, n. *(d)*.

(n) Ante, p. 157, 158; 4 P. & D. 721. S. C. 1 Q. B. 361.†

(o) 4 D. & R. 492.† S. C. 3 B. & C. 172, 173.† S. C. 5 M. & R. 140, 153. R. v. Lyme Regis (Mayor), Doug. 182. See post, tit. "Return" (Traverse, Confession and Avoidance.)

(p) Ante, p. 158. R. v. Boughey, 1 B. & C. 565.† Snook v. Mattock, 5 A. & E. 239.† R. v. Whitfield (Manor), 7 D. 709. R. v. Bishop's Stoke (Manor), 8 D. 608. R. v. Pitt, 10 A. & E. 272.† S. C. 2 P. & D. 385. Snag v. Fox, Palm. 342. Scriven on Copyhold, 525, 527, 530, 4th edit. See 1 P. & D. 172. S. C. 8 A. & E. 858.† where see form of writ. See tit. "Corporation Municipal" (Duties, &c.), "Court Inferior" (Holding).

(q) Snag v. Fox, Palm. 342. Scriv. on Copyh. 525, 4th edit.

(r) See ante, pp. 27, 28; 8 D. 608, *supra*. Scriven on Copyhold, 525, 4th edit. See post, tit. "Application."

(s) Ante, pp. 22, 23; 10 A. & E. 272.† S. C. 2 P. & D. 285, *infra*.

(t) R. v. Rigge, 2 B. & A. 550. Scriven on Copyhold, 531, 4th edit. See tit. "Custom."

(u) Ante, pp. 22, 23. R. v. Pitt, 10 A. & E. 272.† S. C. 2 P. & D. 285. Scriven on Copyhold, 526 n., 4th edit. See *supra*.

cery is an original jurisdiction as to surrenders, admittances, &c., the Court of B. R. will not, in any case, intrude its jurisdiction into a case where the Court of Chancery has previously acted, and has power to go on.

*The writ lies also to command the lord of a manor to receive [*160] and enrol a surrender of a copyhold tenement, parcel, &c. of the manor.(c) But not without payment of all fines due. Thus where a devisee for life on admittance paid a full fine, as on an admittance in fee, and the heir of the devisor surrendered his reversion, it was held that the surrenderee could not compel the lord to enrol the surrender without payment of the fine payable in respect of the descent upon the heir.(w)

The writ lies also to command the lord, &c. to enter upon the Court rolls a certain deed of disposition made pursuant to stat. 3 & 4 Wm. 4, c. 74, s. 53, and in support of the application, it is not necessary to annex a copy of the deed itself to, if the contents be stated in, the affidavit.(c) But as such statute applies only to the equitable estates of tenants in tail of lands held by *copy of Court roll*, the Court has refused a mandamus to command the lord, &c. of a manor to enter on the Court rolls an indenture touching certain *customary freehold* hereditaments, although it appeared that the steward of the manor was accustomed to give admittance, signed by him, to grantees of such hereditaments, but not to enrol the deeds by which they were granted.(y)

The writ lies also to command the lord and steward of a manor to admit one as tenant to a copyhold tenement, and to accept from him a surrender to the use of another according to the custom of the manor, to secure a sum of money and interest by way of mortgage.(z)

The writ also lies to command the lord, &c. to hold a customary Court, and thereat to receive a surrender and grant an admittance according to manorial custom.(a) Thus where by the custom of a manor, all persons not being previously customary tenants, or not dwelling in the manor, who purchased by surrender any of its customary lands, became liable to pay a larger fine to the lord than such tenants or inhabitants. The prosecutor, not being a tenant nor an inhabitant, purchased an equity of redemption in a customary estate, and in order to save the larger fine due in

(v) *R. v. Dullingham (Manor)*, 1 P. & D. 172. S. C. 8 A. & E. 858,† where see a form of writ, &c., Moor. 465.

(w) *Ante*, p. 155, 156; 1 P. & D. 172. S. C. 8 A. & E. 858,† *supra*; but see *Doc d. Winder v. Lawes*, 2 N. & P. 195. *Scriv. on Copyh.* 531, and *n.* As to fines on admittance, see *supra*, p. 158.

(x) *Crosby v. Fortescue*, 5 D. 273. S. P. *R. v. Lynn*, 2 Har. & W. 314.

(y) *Ante*, pp. 27, 28. *R. v. Ingleton (Manor)*, 8 D. 693.

(z) *R. v. Brewers' Company*, 4 D. & R. 492.† S. C. 3 B. & C. 172, 173.† S. C. 5 M. & R. 140, 153. *R. v. Mildmay*, 5 B. & Ad. 254.† S. C. 2 N. & M. 778.† See *tit.* "Corporation Municipal" (Duties), "Courts, Inferior," "Custom."

(a) *Ante*, p. 159, *n.* (m). *R. v. Boughey*, 1 B. & C. 565.† S. C. 2 D. & R. 824.† *R. v. Powell*, 1 Q. B. 352.† S. C. 4 P. & D. 719. *R. v. Hexham (Manor)*, 5 A. & E. 559.† S. C. 1 N. & P. 53;† and see *Scriven on Copyhold*, 525, 4th edit. See *supra*, "Constable" (Appointment), "Corporation Municipal" (Duties, &c.), "Courts, Inferior" (Holding), "Custom."

respect thereof, subsequently became the bona fide purchaser of a smaller estate: the Court granted a peremptory mandamus to command the lord and steward to admit *to the latter, although the effect of admission to the smaller estate was to defeat the lord's claim to the fine due upon the larger estate first purchased; because the prosecutor might lawfully make such second purchase, in order to avail himself of the custom in favour of tenants of the manor.(b)

—.] *Application for Writ*.—As to application for writ, see *supra*, *Admittance*, p. 158, and post, tit. *Application*.

—.] *Rule*.—As to rule, see ante, p. 158, and post, tit. *Rule*.

—.] *Form of Writ*.—As to form of writ, see ante, p. 158, and post, tit. *Writ (Form)*.

—.] *Returns*.—As to returns, see ante, p. 159, and post, tit. *Return*.

—.] 9th. *Court Rolls, &c., Delivery*.—The Court of B. R. will grant the writ to command the steward of a manor to hand over to the lord all Court rolls, &c. improperly detained; but if the steward be an attorney, the writ will be refused, for its object can be sooner and better obtained by a summary application to the Court for an ordinary rule for such purpose.(c)

—.] *Inspection, &c.*—The Court of B. R. will, after a previous demand and refusal, interfere by mandamus, and command a lord of a manor to grant inspection and copy of the Court rolls of his manor to a tenant, or to one prima facie entitled, although his own title may, in some degree, be in question,(d) and this though no cause be depending.(e) For it is only when no action is depending, that the motion is for a mandamus;(f) otherwise the remedy is by rule of Court.

Every copyholder has an interest in the rolls, and the lord ought to grant inspection at all seasonable times, upon request;(g) and the tenant has such right of inspection for any matter that concerns himself, though in a dispute with others.(h) But the application must, in every case be, and the mandamus always is, limited by some legitimate and particular object, in which the applicant has such interest.(i)

(b) Ante, pp. 27, 28; 2 D. & R. 824.† S. C. 1 B. & C. 565,† *supra*, p. 160, n. (a).

(c) Ante, p. 45. *Cocks v. Harman*, 6 East, 401. In re *Lowe*, 8 East, 238. *Hughes v. Mayre*, 3 T. R. 275; and see 6 Sim. 476; 4 B. & A. 48. See tits. "Attorney" (Rolls), "Books," "Court" (Inferior), "Borough," "Corporation" (Municipal).

(d) *Supra*, n. (a), and post, tit. "Application." *Finch v. Ely* (Ep.), 8 B. & C. 112.† S. C. 2 M. & R. 128, n. (a), per Bayley, J.; and see *R. v. Shelly*, 3 T. R. 142, per Buller, J., and the many cases there cited; also *Ex parte Hutt*, 7 D. 690. *Ex parte Barnes*, 2 D., N. S. 20; Com. Dig. tit. "Evidence." *Roe v. Aylman*, Barnes, 321, 236, 237. *R. v. Lucas*, 10 East, 235; Bac. Abr. tit. "Man." (D.)

(e) See post, 162, n. (j). *Scriven on Copyh.* 532, 4th edit.

(f) *Stra.* 1223, notis. *Tidd's Prac.* 649, n. (h). *Scriven on Copyh.* 532, n. (h), 4th edit.

(g) *Love v. Dr. Bentley*, 11 Mod. 134, per Holt, C. J.; 2 B. & Ad. 125, 128, 130;† 4 M. & S. 162, *infra*. See tit. "Livings."

(h) *R. v. Merchant Tailors*, 2 B. & Ad. 125.† *R. v. Tower*, 4 M. & S. 162.

(i) 2 B. & Ad. 125,† and 4 M. & S. 162, *supra*; 10 East, 235.

The cases upon this subject are difficult of arrangement, owing to the nice distinctions by which they are distinguished. Although some of the cases appear to be at variance, yet it seems to be now clearly settled, that the Court will command the lord to allow his tenant to inspect the Court rolls, as to the *existence of a particular *custom*, after application [*162] and refusal, and this though no action be depending. Thus where a copyholder was forbidden by the lord to cut underwood upon the copyhold without the lord's license, the Court, after application to, and refusal by the lord, granted a mandamus, and commanded him to permit the tenant to inspect the Court rolls, so far as related to the cutting of such underwood; and held that he, as the trustee and guardian of the tenant's rights, could not lock up the evidence of them from him, especially in a matter where his own interest was concerned, notwithstanding no suit was pending; for if it were otherwise, the tenant would be obliged to commence an action blindfold, with an uncertainty of what his rights might be.(j)

The writ will also be granted to allow one who has a *prima facie* title to a copyhold tenement, to inspect and take copies of the Court rolls, quoad the copyhold claimed, or in which he may be interested only, though no cause be depending as to it at the time, and the Court, on granting the rule, said, "this is not the impertinent intrusion of a stranger, but the application of one who is clearly entitled to the copyhold; unless there be some conveyance of it, by those under whom he claims; he may, therefore, well require to see whether there appears upon the rolls to be any such conveyance."(k) Also where the devisee of a rent-charge on certain copyholds was desirous of completing his title, the Court granted a rule for the usual limited inspection of the rolls, although the applicant was not, in fact, a copyholder.(l) So a rule has been granted for inspection of the court rolls relating to the defendant's title, in an action by one copyholder against another, for encroachment on the wastes of the manor over which they claimed a right of common,(m) and under similar circumstances, it has been granted at the instance of freehold tenants, and this although the cause was not at issue.(n)

The privilege of thus inspecting, &c. the Court rolls and books of a manor, appears, however, to be confined to the tenants of a manor; for in a question between a lord and a stranger, leave to inspect the Court rolls has been refused.(o) It has been also expressly decided, that although

(j) See *supra*, "Custom." *R. v. Tower*, 4 M. & S. 162, cited in 2 M. & Ry. 128, † S. C. 8 B. & C. 112, † *supra*. Ex parte Best, 3 D. 38. *R. v. Lucas*, 10 East, 235, but see *R. v. Allgood*, 7 T. R. 746; Bac. Abr. tit. "Man." (D.)

(k) 10 East, 235; 2 M. & Ry. 128. S. C. 8 B. & C. 112; † 2 B. & Ad. 123, 129; † 4 M. & S. 162; 2 D., N. S. 21, *supra*. See *Scriven on Copyh.* 532, 4th edit.

(l) 2 D., N. S. 20, *supra*, n. (k).

(m) *Folkard v. Hemet*, 2 W. Blac. 1061; and see 2 M. & Ry. 128. S. C. 8 B. & C. 112, † 2 W. Blac. 1029, *supra*, n. (k).

(n) *Rogers v. Jones*, 5 D. & R. 484. See post, p. 163, n. (s).

(o) *Talbot v. Villebois*, M. 23 Geo. B. R. Tidd, 9th edit. 594, cited also in 3 T. R. 142, *supra*. And see 2 M. & Ry. 128. S. C. 8 B. & C. 112, † *supra*, n. (j).

such leave to inspect, &c., will be granted of course, on the application of a tenant who has been refused that permission; (*p*) yet that where there is not that relation, *there must be a cause or suit instituted, [*163] or some urgent necessity, or specific ground shown; as that the granting it is necessary to prevent injury, or to enable a performance of duties. (*q*)

The Court has also refused a mandamus to permit inspection, &c., by the prosecutor of an indictment (even though he was a tenant of the manor), for the purpose of obtaining evidence to support such indictment against the lord, the Court saying, "that though it might, in substance, be a civil proceeding, yet, in form, it was criminal, and therefore they could not compel the defendant to furnish evidence against himself." (*r*)

It has also been held that a freeholder within a manor may claim the interference of the court of B. R., by mandamus, to obtain inspection, &c., of the Court rolls, &c., although the question depending be as to a right to common. (*s*) But in an action between the freeholder of a manor and the lord, touching a copyhold, the Court refused a rule to inspect, &c., on the ground that the plaintiff was not obliged to assist the defendant to make out his title. (*t*) Also freehold tenants have no right to inspect the Court rolls, unless some cause be depending in which their right may be involved. (*u*) So no stranger to privity of estate has a right to inspect, (*v*) &c., the Court rolls of a manor.

— *Application.*—The lord of a manor is, as before stated, bound to grant his tenants inspection, &c. of the Court rolls at all seasonable times, upon request; so that the tenant must demand, and the lord refuse such inspection, before the Court is applied to for its interference; but any tenant whether jointly or severally interested, is entitled to, and may demand, inspection alone, without the concurrence of the others. Such demand must be made personally, or by agent, and cannot be made by the agent of a person authorized, by power of attorney, to make such demand on behalf of the tenant, although the agent's authority be in writing. (*w*) The demand should also be limited to some legitimate and particular object

(*p*) 3 T. R. 141, *supra*. Wood v. Whitcomb, E. 6 Anne, C. B., 12 Vin. 146, and see 2 M. & Ry. 128. S. C. 8 B. & C. 112,† *supra*. See post, p. 163, 164.

(*q*) 2 B. & Ad. 125, 128, 130,† and 4 M. & S. 162, *supra*, n. (*k*).

(*r*) R. v. Cadogan (Lord), 1 D. & R. 559,† S. C. 5 B. & A. 902; 2 M. & Ry. 128. S. C. 8 B. & C. 112,† *supra*. Smith v. Davies, 1 Wils. 104. Bac. Abr. tit. "Man." (D.)

(*s*) Ante, p. 162. Addington v. Clode, 2 W. Blac. 1030; also cited in 2 M. & R. 128. S. C. 8 B. & C. 112,† *supra*. See Hobson v. Parker, Barnes, 237, and Rogers v. Jones, 5 D. & R. 484,† *accor.* Smith v. Davies, 1 Wils. 104, *cont.* Seriv. on Copyh. 532, n., 4th edit.

(*t*) Smith v. Davies, 1 Wils. 104, cited in 2 M. & Ry. 128. S. C. 8 B. & C. 112,† *supra*.

(*u*) R. v. Allgood, 7 T. R. 746. Smith v. Davies, 1 Wils. 104. R. v. Merchant Tailors, 2 B. & Ad. 115,† But see 5 M. & Ry. 128. S. C. 8 B. & C. 112,†

(*v*) 12 Vin. Abr. 146. Crew v. Saunders, Stra. 1005.

(*w*) Ex parte Hutt, 7 D. 690. See 1 Reg. Gen., H. T., 2 Wm. 4, s. 102; 1 D. 197. See post, tit. "Application" (Demand and Refusal).

in which the applicant has an interest.(*x*) It seems that the demand may be to, and the application to the Court be, against the steward alone, because the lord, it *is said, has no interest in such a question ;(*y*)but is apprehended, that the prudent course is to make also the lord a party.(*z*) [*164]

——. *Rule*.—The practice seems to have formerly been, that if the rule were moved for on behalf of a copyhold tenant, it was absolute in the first instance,(*a*) and now by 1 Reg. Gen., II., 2 Wm. 4, s. 102, it is ordered that “an order upon the lord of a manor, to allow the usual limited inspection of the Court rolls, on the application of a copyhold tenant, may be absolute in the first instance, upon an affidavit that the applicant has applied for and has been refused inspection.(*b*). But this rule has been held to be applicable only to cases in which an action is pending, and not to an ex parte application, in which latter case, the rule is nisi only in the first instance.(*c*)

MANOR COURTS.] See titles *Courts Inferior ; Manor (Leet, Baron)*.

MARCHES.] *Clerk of Fines in ; Election*.—The writ lies to admit one elected Clerk of the Fines in the Marches of Wales, although it was at first denied, because it did not then appear what the office was.(*d*)

——.] *Deputy Secretary ; Admission*.—The writ lies also to command the lord president and council of the marches to admit to the exercise of the office of Deputy Secretary of the Courts of the Marches.(*e*) For although a mandamus does not lie for a deputy, yet it lies for him who deposes either to have the deputy admitted or restored ; for otherwise such principal may be deprived of his power to make a deputy.(*f*)

——.] ——. *Restoration*.—The writ lies to restore a deputy ; and on such a mandamus to restore the Deputy Secretary of the Courts of Marches, it was held to be no good return, that at the time of the writ delivered, he was not constituted deputy ; because of the uncertainty as to whether he had not been put out of his place before the writ came to the defendants.(*g*)

(*x*) R. v. Merchant Tailors' Company, 2 B. & Ad. 124, 125,† per Tenterden, C. J. ; 4 M. & S. 162, supra. See post, tit. “Application” (Demand and Refusal).

(*y*) Rogers v. Jones, 5 D. & R. 484,† R. v. Whitford (Manor), 7 D. 711, per Lord Denman, C. J. See ante, p. 158.

(*z*) R. v. Powell, 1 Q. B. 355,† S. C. 4 P. & D. 722. See ante p. 158.

(*a*) R. v. Shelley, 3 T. R. 142, per Buller, J. ; 2 W. Blac. 1029, 1030, n. (*u*). See post tits. “Application,” “Rule.”

(*b*) 3 B. & Ad. 389 ;† 1 D. 197. See 1 Q. B. 355,† n. R. v. Evans.

(*c*) Ex parte Best, 3 D. 39, per Littledale, J. But see Ex parte Hutt, 7 D. 690, and Ex parte Barnes, 2 D., N. S. 29, where, the rules were granted absolute in the first instance.

(*d*) Dolben's case, 1 Keb. 872, 881, the Court perusing the precedents in Dr. Goddard's case, Townsend's case, and Latch. 123. See tits. “Ashburton” (Eight men of), “Office.”

(*e*) R. v. Clapham, 1 Vent. 110. S. C. 2 Keb. 738, 442. S. C. 1 Lev. 306, nom. R. v. Marches (President). Com. Dig. tit. “Man.” (A). Bac. Abr. tit. “Man.” C. See tit. “Deputy Officer.”

(*f*) See note(*b*), and R. v. Roberts, 3 A. & E. 776,† And see tit. “Office” (Deputy).

(*g*) 1 Lev. 306. S. C. 2 Keb. 738, 742. S. C. Vent. 110, supra. See tit. “Office” (Restoration), and post, tit. “Returns” (Certainty).

MARRIAGES, REGISTRAR OF.] See tit. *Registrar of Births, &c.*

[*165] MARSHALSEA, COURT OF.] See titles *Attorney; Court (Inferior)*.

MASON'S COMPANY.] *Clerk; Restoration*.—The writ lies to restore to the office of Clerk of the Company of Masons in London.(h)

MASTER OF COLLEGE.] See titles *College (Master); School (Master)*.

MASTER OF SCHOOL.] See titles *College (Master); School (Master)*.

MAYOR.] The writ lies for the office of mayor, because it is a public one, and concerns public government.(i)

The subject is arranged as follows :—

MAYOR.					MAYOR.				
Election	-	-	-	165	Swearing in	-	-	-	167
Application	-	-	-	166	Return	-	-	-	168
Affidavits	-	-	-	167	To perform duties	-	-	-	168
Rule	-	-	-	167	Application	-	-	-	168
Form of writ	-	-	-	167	Return	-	-	-	168
Admission	-	-	-	167	Restoration	-	-	-	168

—.] *Election*.—The writ lies to command a corporation, or other municipal body to assemble and proceed to the election of a mayor, under stat. 11 Geo. 1, c. 4, s. 2;(j) although there have been no legal mayor for some years;(k) and for the purpose of such election, the Court will, if necessary, command the holding of a Court leet;(l) or that the corpo-

(h) Stamp's case, Comb. 348. See tit. "Office" (Restoration.)

(i) Scarborough's case, H. 16 Geo. 2, Stra. 1180, and cases there cited. Manaton's case, Raym. 365. Com. Dig. tit. "Man." (A.) See stat. 9 Anne, c. 20, and stats. 11 Geo. 1, c. 4, and 1 Vict. c. 78, s. 26; 19 Geo. 2, c. 12 (1.), App. See tit. "Office" Public.)

(j) See stat. App., and also stat. 19 Geo. 2, c. 12 (1.), App. R. v. Heydon, (Aldermen,) Say. 208. R. v. Newsham, Say. 211. R. v. Plymouth (Borough), 1 Barn. 81, 130. R. v. Bridgewater (Corp.), 3 Doug. 378.† Scarborough case, Stra. 1180, and cases there cited; 2 T. R. 732, n. R. v. Colchester, (Mayor,) 4 Doug. 14.† R. v. Robinson, 8 Mod. 336. R. v. Robinson, Stra. 555. R. v. Morgan, 7 Mod. 322. R. v. West Looe, (Corp.) Burr. 1386. R. v. Cambridge (Mayor), Burr. 2008. R. v. Hoskins, Cas. t. Hard. 188. R. v. Truro, (Mayor) 2 Chit. 257.† But see Townsend's case, 1 Keb. 458. R. v. Edyvean, 3 T. R. 352. R. v. Abingdon, (Mayor) Holt, 441. See tits. "Corporation" (Municipal), "Office" (Election), and stat. 6 & 7 Vict. c. 89, App., which now regulates the law of England upon this subject; the provisions of which statute have not been extended to Ireland.

(k) R. v. Oxford, M. 9 Geo. 2; Bull. N. P. 201, a, 7th edit.; Com. Dig. tit. "Man." (A.) R. v. Truro, (Mayor) 2 Chit. 257.†

(l) R. v. Bankes, 1 W. Blac. 444. S. C. Burr. 1452. R. v. Curghey, Burr. 782. Bull. N. P. 196, 197. Borough of Christchurch case, 12 Geo. 2. See tits. "Courts Inferior," "Manor" (Leet).

rators assemble, and proceed to the election.(m) Usually on applications of this kind, the office of mayor is vacant,(n) but the court will grant such writ, although there may have been a void election;(o) or [*166] though there may be a mayor, de facto, but not de jure;(p) for the court has a discretionary power upon considering all the circumstances of the election, to award or not the writ of mandamus, as the justice of the case may require. Thus, if on all the circumstances of an election de facto, the legality thereof be doubtful, the Court will not award the writ, it being in such case proper, that the legality thereof should be tried on an information in the nature of a quo warranto. But if, on the contrary, upon all the circumstances of such an election, it appear to be clearly illegal, or merely colourable, and therefore void (as by the incompetency of the party elected, or the irregularity of the election,) the Court ought to, and will award a mandamus to proceed to a new election, because it would, in the latter case, be nugatory to try the legality of the election, by the information in the nature of a quo warranto.(q). Thus where a person is elected mayor for a year immediately succeeding that during which he has served the office, and which, by stat. 9 Ann. c. 20, s. 8, is void, the Court will grant a mandamus to proceed to another election, pursuant to stat. 7 Wm. 4 and 1 Vict. c. 78, s. 26.(r) So where the mayor who presides at the election of a new mayor is only mayor de facto and not de jure, and is subsequently removed by judgment of ouster, the election of the new mayor is void, and the Court will grant a mandamus for the election of a new mayor, under stat. 11 Geo. 1, c. 4, although a quo warranto be depending against the present mayor.(s)

So the writ lies to command a return of the name of the person elected mayor.(t) A jurat who has neglected to take the Sacrament, pursuant to stat. 13 Car. 2 c. 1, may be elected mayor; for the stat. 5 Geo. 1, c. 6,

(m) R. v. Edyvean, 3 T. R. 352.

(n) R. v. Bedford, (Corp.) 1 East, 79. R. v. Stoke, Damarel, 5 A. & E. 589. S. C. 1 N. & P. 56.† See tit. "Office," (Election).

(o) R. v. Newsham, Say. 211. Case of Bossiney, H. 8 Geo. 2, Stra. 1003. Case of Aberystwith, T. 14 Geo. 2, Stra. 1157. R. v. Pembroke, (Corp.) 8 D. 302. R. v. Cambridge, (Mayor) Burr. 2008; 1 East, 79, supra. See stats. 9 Anne, c. 20, s. 8, 7 Wm. 4 & 1 Vict. c. 78, s. 26, App. See tit. "Office" (Election).

(p) R. v. Colchester, (Mayor) 2 T. R. 260. R. v. Bankes, Burr. 1454. S. C. 1 W. Blac. 445. Anon., 1 Barn. 138; Andr. 280; 15 Vin. Abr. 216, (z) pl. 1; 3 Bac. Abr. 540. And see Stra. 1003, 1157, and Burr. 2008, supra. See, as to Ireland, stat. 19 Geo. 2, c. 12, s. 8.

(q) See ante, p. 15, 26. Say. 212, supra. R. v. Cambridge, (Mayor) H. 7 Geo. 3, Burr. 2008. R. v. Colchester, (Mayor) 4 Doug. 14. R. v. Bedford, (Corp.) 1 East, 79, and n. (b). R. v. Bankes, Burr. 1454. S. C. 1 W. Blac. 445. R. v. Colchester, (Mayor) 2 T. R. 260. Bossiney's case, Stra. 1003. R. v. Stoke Damerel, 5 A. & E. 589.† S. C. 1 N. & P. 56.† And see R. v. Ely (Ep.), 2 T. R. 334, and R. v. York, 4 T. R. 699. Com. Dig. tit. "Man." (A.) See tits. "Churchwarden" (Election), "Councillor, &c.," (Election), "Office" (Election).

(r) R. v. Pembroke, (Corp.), 8 D. 302. R. v. Cambridge, (Mayor) Burr. 2008.

(s) R. v. Bridgewater, (Corp.) 3 Doug. 379.† See as to Ireland, stat. 19 Geo. 2, c. 12 App.

(t) Martin v. Jenkins, 7 Mod. 365. S. C. Stra. 1145. And see Burr. 1013.

s. 3, prevents him from being proceeded against on account of this omission.(u)

— *Application*.—It has been held, that on a judgment of ouster against a mayor de facto, a mandamus to elect a new mayor will not be granted, until after the four-day rule for judgment shall have expired, [*167] and *such judgment shall have been actually signed.(v) The prosecutor of the information, &c. is entitled to priority of motion for the rule.(w)

The application to the Court is now governed by stat. 6 & 7 Vict. c. 89, Appendix, the requisition of which should be strictly complied with. This statute has not been extended to Ireland.

— *Affidavits*.—When first the writ was moved for, after the passing of the stat. 9 Ann. c. 20, an affidavit of the facts was always produced but such an affidavit is not requisite.(x)

— *Rule*.—The rule to proceed to the election of a mayor, is absolute in the first instance, in those cases where the mayor holds over, or where an actual vacancy by means of death has occurred,(y) or where the election is absolutely void.(z) In all cases where there is a subsisting mayor de facto, he must be served with notice of application for the writ, and be made a party to the rule and writ.(a)

— *Form of Writ; Direction*.—The writ must be directed to the corporation by its corporate name, although there may be no mayor at the time the writ is granted.(b)

—.] *Admission*.—The writ lies to command admission to the office of mayor(c) of one duly entitled to such admission.

—.] *Swearing in*.—At one time it was unsettled whether the writ of mandamus lay to swear in to the office of mayor.(d) But is now clearly settled, that on a proper case made, the writ will be granted to swear in such an officer, or any other head officer of a municipal corporation,(e)

(u) Supra, note (t). See tit. "Jurat."

(v) R. v. West Doe (Corp.), Burr. 1386. And see R. v. Ollerhead, or R. v. Wigan (Corp.), Burr. 782, 785, overruled as to this point. Com. Dig. tit. "Man." (A).

(w) Burr. 1387, supra.

(x) Anon., Burr. 235. See post, tit. "Application," (Affidavits).

(y) Anon., 2 Chit. 257.† R. v. Arnold, 4 A. & E. 659.† R. v. Heydon (Aldermen), Say. 208. R. v. Colchester (Mayor), 4 D. 14, where see form of rule. See post, tit. "Rule."

(z) Ante, p. 166. R. v. Pembroke (Corp.), 8 D. 302.

(a) R. v. Bankes, 1 W. Blac. 445. S. C. Burr. 1452. Com. Dig. tit. "Man." (A). R. v. St. Martin's, 1 T. R. 149. R. v. Truro (Mayor), 3 B. & A. 592.† Bac. Abr. tit. "Man." (D). See stat. 6 & 7 Vict. c. 89, App., which has not been extended to Ireland. Ante, p. 165, n. (j).

(b) R. v. Bridgewater (Corp.), 3 Doug. 379.† R. v. Bedford (Corp.), 1 East, 79. R. v. Pembroke (Corp.), 8 D. 304. See post, tit. "Writ" (Direction).

(c) Trem. Pl. Cor. 451, where see form of writ; also Trem. Pl. Cor. 445, a form to admit and swear in. Bac. Abr. tit. "Man." (C). See tit. "Office" (Admission). As to Ireland, see stat. 19 Geo. 2, c. 12, s. 1, App.

(d) Anon., Sty. 299, where Roll, C. J., said, there was no precedent to swear such an officer, yet ordered that notice should be given to the town, and precedents to be brought into Court, if any, to warrant it.

(e) R. v. Stephens, Sir T. Jon. 177, 215. Patrick's case, Raym. 111. R. v. Hull,

upon production of an affidavit that he or they have not been sworn in. *(f)*
 *Thus it has been granted to command the swearing in of the newly
 elected mayor, and to command him to appear and take the neces- [*168]
 sary oaths, &c. *(g)* And for this purpose, the Court of B. R. will, if neces-
 sary, command the steward of a Court Leet to hold a Court, and the jury
 to present to such steward one chosen mayor, in order to be sworn. *(h)*
 But the Court will refuse, even at the prayer of the Attorney General, a
 mandamus to command the swearing in of one as mayor after a peremptory
 mandamus has been granted to swear in another to the same office. *(i)*

——. *Return.*—It has been held to be a good return to a mandamus
 to swear in, &c., that judgment has been previously given against the
 applicant in an information in the nature of a quo warranto, and that he
 has not since qualified. *(j)*

——.] *To perform Duties, &c.*—So the writ will be granted to com-
 mand the person duly elected mayor, or any other public officer, to take
 upon himself the duties of his office. *(k)*

——. *Application.*—The affidavits in support of the application for a
 writ for the above purpose need only state the election and refusal to enter
 upon the duties of the office. *(l)*

——. *Return.*—To such a madamus, a return of any legal excuse or
 privilege will be good. *(m)*

——.] *Restoration.*—The writ will also be granted to restore to the
 office of mayor, on an unjust deprivation, &c.; *(n)* but not if his year of
 service have elapsed. So if he be entitled to hold over, and no one have
 been subsequently elected, he is entitled to the writ. *(o)*

11 Mod. 390. S. C. Stra. 625. S. C. Bro. P. C. 178; Ld. Raym. 1447; Cowp. 509. R. v. Tregony (Mayor), 8 Mod. 111, and cases there cited. S. C. 8 Mod. 127; Stra. 334. R. v. Searle, 8 Mod. 332; Com. Dig. tit. "Quo Warranto" (C. 5). See forms of writs, Trem. Pl. Cor. 453, 454, 514. See tits. "Churchwardens" (Swearing in), "Office" (Swearing in).

(f) R. v. Montacute (Ld.), 1 W. Blac. 61. S. C. 1 Wils. 283.

(g) R. v. Bedford (Corp.), 1 East, 80. Manaton's case, Raym. 365, where see a form of return. Trem. 450. Veal's case, Raym. 431; Trem. 454. See tits. "College" (Oaths), "Constable" (Swearing in), "Oaths," "Office" (Restoration Returns).

(h) Ante, p. 150. R. v. Christchurch, M. 12, G. 2, or R. Willis, Andr. 279. R. v. Montacute (Ld.), 1 W. Blac. 62. S. C. 1 Wils. 283; 1 W. Blac. 444. S. C. Burr. 1453, supra. R. v. Abingdon (Mayor), 2 Salk. 699, 3. S. C. Ld. Raym. 559. See tit. "Manor" (Leet).

(i) R. v. Turner, T. Jones, 215, and cited in R. v. Clarke, 2 East, 82. Sed Vide. R. v. Harris, Burr. 1422. See post, tit. "Application."

(j) R. v. Hull, 11 Mod. 390. S. C. nom. R. v. Hearle, Stra. 625. S. C. 3 Bro. P. C. 178, Ld. Raym. 1447, and see Cowp. 509. See post, tit. "Return."

(k) R. v. Leyland, 3 M. & S. 184. R. v. Simmons, 3 Doug. 237.† R. v. Colchester (Mayor), 4 Doug. 14.† R. v. Bedford (Corp.), 1 East, 80. In re Walsall, 1 H. & W. 370. See tits. "Alderman" (Enforcing Duty), "Corporation Municipal" (Duties, &c.), "Office" (Enforcing Duty).

(l) 3 Doug. 237;† and 4 Doug. 14,† supra. See post, tit. "Application."

(m) 3 M. & S. 184, supra. See post, tit. "Return."

(n) See stat. 9 Ann. c. 20, s. 1, App. Mayor of Durham's case, 1 Sid. 33. R. v. Searle, 18 Mod. 334. See tit. "Office" (Restoration). As to Ireland see stat. 19 Geo. 2, c. 12, s. 1, App.

(o) 1 Sid. 33; 8 Mod. 334, supra. R. v. Hearle, Stra. 625. S. C. 3 Bro. P. C. 178. S. C. nom. R. v. Hull, 11 Mod. 390.

MAYOR'S COURT.] See titles *Courts Inferior*; *London*.

MERCHANT TAILORS' COMPANY.] *Election*.—The writ lies to command [*169] *the Merchant Tailors' Company to call a meeting of the company on the next annual day of election, for the purpose of electing a master and wardens according to their charter; but if it be suggested as the ground of the motion that the officers de facto were improperly elected by a part only of the company instead of the whole body the Court will refuse the writ.(p)

MEETING HOUSE.] See tit. *Dissenters (Meeting House)*.

MILITIA.] *Commissioners*.—The writ has been granted to command the Lord Lieutenant of Anglesea to declare commissions in the militia vacant.(q)

MINISTER.] See titles *Dissenters (Minister)*; *Living*; *Parson*.

MINT.] *Restoration*.—It has been decided, that the writ of mandamus lies to restore to the office of "*workman in the Mint*."(r) But in another case, where it was applied for to restore to the office of "*Moneyer of the Mint*," the Court refused the application; because no sufficient interest in the employment appeared, and no more than a mere service was disclosed, as that of a coalmeter, filler, clerk of the waters, &c. in London: and it was ordered that a special suggestion be made, that it was an office granted by patent,(s) the nature of the office should therefore appear in the writ.

As to the office of Mint master being in its nature incompatible with that of Alderman, see *London (City) v. Swallow*.(t)

MODUS.] See titles *Inclosure*; *Tithe*.

MONEY.] The writ lies to command the treasurer and directors of a company to pay a sum of money awarded to be due from the company, when the act of Parliament incorporating the company does not authorise execution to issue against the effects of individual members of such corporation.(u) It also lies to command an overseer to pay money due under a

(p) Ante, p. 11. *R. v. Attwood*, 4 B. & Ad. 482.† *R. v. Chester (Citizens)*, 1 M. & S. 191. See tits. "*Charter*," "*Company*," "*Corporation*" (*Municipal*), "*Office*" (*Election*).

(q) *Gude's Cr. Pr.* 206.

(r) *Sterling al Monier's case*, 1 Sid. 304, 2 B. 8, as to which quære, the report does not show the nature of the office. See also 2 Keb. 91. See tit. "*Office*" (*Restoration*).

(s) *R. v. Sterling*, 2 Keb. 65, 91. See tits. "*Ashburton*" (*Eight Men of*), "*Office*."

(t) 2 Keble, 59. See tit. "*Office*," p. 172, 173 (*Incompatible Office*).

(u) Ante, p. 23. *R. v. St. Katharine's Dock*, 4 B. & Ad. 360.† *Wormwell v.*

parish contract.(v) Before however the Court will grant a mandamus for *the payment of money by a parish or corporation, &c., it [*170] will first ascertain whether the debt be clearly existent. Thus, although the stat. 43 Geo. 3, c. 110, s. 2, provides, that a twentieth part at least of the sums borrowed by visitors and guardians of the poor, under stat. 22 Geo. 3, c. 83, s. 20, shall be paid off or provided for every year; yet the debt is not extinguished in cases where no such payment or provision has been made for twenty years. So that on the application of one who has advanced money since the passing of stat. 43 Geo. 3, c. 110, but more than twenty years before the application, and notwithstanding the parish had neither paid nor provided for any part of the principal, and some interest was due, the Court granted a mandamus to the guardians, &c. to pay the principal and interest, but refused to grant a writ to make a rate for payment of the principal and interest.(w) But wherever there exists a specific legal remedy whereby the money can be recovered, the mandamus will be therefor refused.(x)

As to accounting for a payment of money to or by a constable, &c. See titles *Constable*; *Municipal Corporation (Insignia)*; *Overseer*.

MONEYER OF THE MINT.] See titles *Ashburton (Eight Men of)*; *Mint*.

MONK.] Restoration.—The writ lies not to restore a monk.(y)

Indeed for monks, a mandamus was never granted, because they were Ecclesiastical and had a proper visitor.(z)

NEWCASTLE, HOSTMEN OF.] Admission.—The writ lies to command an admission into the fraternity of the hostmen in Newcastle-upon-Tyne.(a)

NEWGATE.] Payment of Fees.—The writ lies to command the county treasurer of Middlesex, to pay to the clerk of the Session of gaol delivery

Hailstone, 6 Bing. 668. See tits. "Award," "Company," "Compensation" (Execution), "Execution," "Patent." R. v. Victoria Park, 4 P. & D. 643. S. C. 1 Q. B. 292.† R. v. Dewsbury Roads, 4 Jur. 26.

(v) R. v. Beeston, 3 T. R. 592. See tits. "Contract," "Overseers," "Parish," "Poor" (Relief Maintenance).

(w) R. v. Carpenter, 6 A. & E. 794.† R. v. St. Saviour's (Parish), 7 A. & E. 943.† S. C. 3 N. & P. 126. S. C. 1 N. & P. 496;† and see 6 A. & E. 798,† n. (a). See tits. "Parish" (Loan), "Rate."

(x) Ante, p. 23. See tits. "Compensation," "Execution," "Patent."

(y) R. v. London Waterworks, 1 Lev. 123, per Wyndham, J. See Middleton's case, 1 Sid. 163, per Wyndham, J. See tits. "Abbot," "Knight Templar," "Office," "Prior," "Visitor."

(z) Ante, p. 22. See Mr. Leigh's case, 3 Mod. 334, and Appleford's case, 1 Mod. 84. Dr. Withrington's case, 1 Sid. 71. See tits. "Proctor," "Visitor."

(a) R. v. Newcastle Hostmen Company, Stra. 1223. See tits. "Company," "Franchise," "Freedom," "Freeman."

of Newgate, a fee certain, or sum of money for all convicts sentenced to transportation.(b)

NEW RIVER WATER.] *Surveyor; Restoration.*—The writ has been granted to restore to the office of surveyor of the new river water.(c)

[*171] *——.] *Treasurer; Restoration.*—A mandamus has been granted to restore to the office of treasurer of the new river,(d) it being alleged to be an office of public concern,(e) the writ was not a peremptory one, but de bene esse only, in order to bring the matter before the Court, though it was a corporation, settled by act of Parliament.(f)

NEW TRIAL. See titles *Courts Inferior (New Trial); Quarter Sessions.*

NUISANCE.] *Removal.*—The writ has been granted to command the removal and abatement of a nuisance, as a bowling green, without the formality of the proceedings ordinarily taken, as on indictment, &c.,(g) but the fact of the nuisance must be made certain either by matter of record,(h) as by the presentment of a grand jury, or by the justices at Westminster, who may on their own view, command the nuisance to be abated.(i)

So the writ lies to command the Quarter Sessions to give judgment for abating a nuisance.(j)

OATHS OF ALLEGIANCE.] See tit. *Manor (Court Lect; Oath of Allegiance).*

OATHS.] See titles *College (Oaths); Dissenters (Ministers); Office (Restoration Return); Toleration Act.*

(b) R. v. Baker, &c., 2 N. & P. 375. S. C. 7 A. & E. 502.† See tits. "Gaol," "County," "Money," "Office" (Inferior).

(c) Anon. Comb. 347, cited in Anon., 1 Barn. 135. See tit. "Office" (Restoration).

(d) R. v. Raines, 3 Salk. 233, 11, 13, and cases there cited; Bac. Abr. tit. "Man." C.

(e) R. v. Rushworth, Kel. 287. Middleton's case, 1 Sid. 169. S. C. 1 Keb. 625, 629. S. C. 1 Lev. 123, nom. R. v. New Waterworks (Governors). The Court, however, much doubted whether mandamus lay in this case, but it being strongly pressed by Maynard, the Attorney-General, and Wylde and all the King's Counsel, to have the writ, the Court consented it should go, and that they would consider further upon the return thereof. S. C. approved in R. v. London (Mayor), 2 T. R. 182, n. (b); Calthorp's Rep. 56; Com. Dig. tit. "Man." (A.) See tit. "Office" (Public).

(f) Leigh's case, 3 Mod. 334. S. C. 1 Show. 252. See 1 Keb. 631, supra where it is said that the Court doubted whether restitution would ever be granted. See tit. "Act of Parliament."

(g) R. v. St. John's Coll., Comb., 282, per Holt, C. J. S. C. 4 Mod. 237; Ld. Raym. 277, 608; Bac. Abr. tit. "Man." (D.)

(h) Hall's case, 1 Mod. 76, and cited in Comb. 282.

(i) Comb. 282, and 4 Mod. 237, supra. See tit. "Presentment."

(j) Cited in Dr. Walker's case, Cas. t. Hard. 214. See tits. "Courts, Inferior" (Judgment), "Quarter Sessions."

OFFICE.] The writ of mandamus, founded it is said upon a passage(*jj*) of Magna Charta, c. 29, (*k*) has been by a great number of cases held to be *grantable, as well to admit him who has a right as to restore [*172] him who has been wrongfully displaced, to any office, function, or franchise of a public nature, whether spiritual or temporal, judicial or ministerial, (*l*) and also to command the officers thereof, to do all legal acts constituting or connected with their official duties, provided there be no other specific legal remedy, whereby they can be enforced. (*m*). If, however, there formerly might have been a specific legal remedy, as by writ of assize, or other process, which has since fallen into desuetude, in such cases the writ of mandamus will nevertheless be granted. (*n*)

This most important and extensive subject is arranged as follows:—

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(*jj*) Ante, p. 2, 5. Nullus liber homo capiatur vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terrae; nulli vendemus, nulli negabimus aut differemus justitiam vel rectum.

(*k*) Bull. N. P. 195. Dolben's case, 1 Keb. 872, 852. R. v. London (Ep.), 1 Wils. 11. S. C. Stra. 1192. R. v. London (Mayor), 2 T. R. 180.

It was not, however, usual to grant the writ in order to try titles to offices before stat. 9 Ann. c. 20. Knipe v. Edwin, 4 Mod. 281.

(*l*) 3 Blac. Com. 110. Bagg's case, 11 Rep. 93; 2 Sid. 112. Audley's case, Latch. 123. S. C. Poph. 176. Middleton's case, 3 Dyer, 332, b. n. 333, pl. 28; and see R. v. Godwin, 1 Doug. 397. For a definition of the term office, see Bac. Abr. tits. "Officer" (A.), "Man." C. See post, p. 173.

(*m*) Ante, p. 12, 18—27. R. v. Cambridge (U.), 1 W. Blac. 552. S. C. Burr. 1647. See tit. "Alderman" (Duties, &c.), and post, tit. "Enforcing Duties."

(*n*) Ante, p. 5, n. (*h*), 19, n. (*p*), 20, n. (*q*), (*r*), (*s*), and the numerous cases there cited. R. v. Wheeler, Cas. t. Hard. 99; Com. Dig. tit. "Man." (B).

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[*173] *—.] 1st. *For what Offices.*—It may be here generally stated,(*o*) that the writ of mandamus lies for all offices of a public(*p*) nature, whether spiritual, temporal, corporate, &c.(*q*) judicial or ministerial for which there exists no specific legal remedy.(*r*)

The writ lies also for a function with emoluments or fees annexed, if there be no specific legal remedy. Thus, it lies to admit a dissenting minister to the use of the pulpit of a dissenting meeting house,(*s*) which cannot be considered an office, it is in fact a function merely,(*t*) and it has since been held, that although the place be not in strictness what Lord Coke would have termed an office, yet the Court will not on that account refuse to grant the writ.(*u*)

—.] *Public.*—The office must be one of a public nature, to be the subject of a mandamus,(*v*) as where it concerns the administration of justice, as a leet,(*w*) or where it concerns any public or necessary work, or administration of government,(*x*) or where the office or function is [**174*] for the public *weal.(*y*) The value of the importance to the public

(*o*) See ante, p. 12.

(*p*) See definition of the word "Public," infra, (Public).

(*q*) See stat. 9 Ann. c. 20, and 1 & 2 Wm. 4, c. 21, App. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App. Ante, p. 172.

(*r*) Ante, p. 18—27.

(*s*) See tits. "Curate," "Dissenters," "Franchise," "Freedom." R. v. Barker, Burr. 1270, and see R. v. Land Tax Commissioners, 1 T. R. 148. See Estwick v. London (City), Sty. 42.

(*t*) See 1 T. R. 148, supra. R. v. London (Ep.), 1 Wils. 11. S. C. Stra. 1192.

(*u*) R. v. Darlington Grammar School, cited in Ex parte Le Cren, 2 D. & L. 574; and see ante, p. 4.

(*v*) Ante, p. 9, 12. Anon. 1 Barn. 123; Anon. Comb. 133; Sty. 457, supra. (This was, however, a case of a writ of restitution, but which writ, as regarded offices, was the same as mandamus, ante, p. 3.) R. v. London (City), 2 Barn. 398. Clerk of City Works' case, 2 Sid. 112. Stamp's case, 1 Sid. 40. Middleton's case, 1 Sid. 169. S. C. 1 Keb. 625. R. v. White, 3 Salk. 232. Hurst's case, 1 Lev. 75; Anon. Comb. 41; Anon. Comb. 133; Anon. Comb. 347. R. v. London (Mayor), 2 T. R. 183, n. (*b*). See Bac. Abr. tit. "Office" (A.) See tit. "Reading" (Steward).

(*w*) See supra, "Manor" (Leet Steward). R. v. New River, 1 Keb. 629; 2 Sid. 113, supra. R. v. Blooer, Burr. 1044.

(*x*) Supra. See tits. "Act of Parliament," "Constable," "Manor" (Leet Steward). See ante, p. 12.

(*y*) Supra, 2 T. R. 183, n. (*b*); 2 Sid. 112, 113; Burr. 1044, supra. See ante, p. 12, and tits. "Drainage," "King's Beam."

is not however scrupulously weighed.(z) There must be an absence of any specific legal remedy.(a)

So on the other hand, it has been clearly settled, that to a *private* office which does not concern the public, neither admission nor restitution will be granted through the medium of the writ of mandamus,(b) as, to the place of clerk of a private company in London,(c) or of steward of a Court Baron,(d) &c. See the several titles throughout this series.

Nor will the writ be granted for a mere private appointment, which may be terminated at the will of the appointor.(e)

—.] *The office must be known to the Law.*—So the Court will not grant a mandamus to admit to an office not known to the law, as to that of a vestry clerk,(f) or that of second curate,(g) nor will it be granted for an office not judicially known to be one, unless it be specially described in the affidavits, thus, stating an office to be “one of the eight men of Ashburn Court” was held insufficient, the duties of the office not being described,(h) nor will the writ be granted for an office in fieri.(i) But although the exact nature or quality of the office be not ascertained by the affidavits, yet if they be *prima facie* sufficient, the Court will require a return.(j)

—.] *Freehold.*—The writ of mandamus will not be granted for an office or function which is not a freehold; it should also have either fees or emoluments annexed to it.(k) Thus it lies for an office for life, or for one to which the officer is appointed *quamdiu se bene gesserit*, which is in law a freehold for life.(l)

(z) Ante, p. 12, n. (r). R. v. Barker, Burr. 1265; Bac. Abr. tit. “Man.” 257. R. v. Oxenden, 1 Show. 263.

(a) Ante, pp. 5, 18, 27.

(b) Ante, p. 12. R. v. London (Mayor), 2 T. R. 182, n. (b). See The Protector v. Craford, Sty. 457. Isle’s case, 1 Vent. 143; 3 Salk. 231, 9. R. v. Ward, Fitzg. 194; Gude’s Cr. Pr. 180. “Dissenters” (Minister, Admission), (Restoration).

(c) See tit. “Clerk of Private Company.” White’s case, 6 Mod. Cas. 18; Com. Dig. tit. “Man.” (B.)

(d) Stamp’s case, 1 Sid. 40. Middleton’s case, 1 Sid. 169. See tits. “Dean and Chapter” (Clerk, Restoration), “Manor” (Court, Baron, Steward).

(e) R. v. London (Mayor), 2 T. R. 178, 179. See tits. “Custos Brevium” (Clerk), “Guardians” (Clerk), “Mint” (Restoration).

(f) 5 T. R. 713. R. v. St. Nicholas (Parish), 4 M. & S. 324. See tits. “Guardians of Poor” (Clerk), “Vestry Clerk.”

(g) Ante, p. 113, n. (g). Anonymous, 2 Chit. 253. See tit. “Ashburton” (Eight Men of).

(h) Anon. 2 Mod. 316, and cases there cited; Com. Dig. tit. “Man.” (B.) See tits. “Ashburton” (Eight Men of), “Tiverton” (Twenty-four men of), *infra*, “Election.”

(i) Ante, p. 113, n. (g). Anon. 2 Chit. 253.

(j) R. v. New River, 1 Keb. 631.

(k) R. v. St. Nicholas Parish, 4 M. & S. 325. Dighton’s case, 1 Vent. 82. R. v. Dolgelly Union, 8 A. & E. 562.† The case of Schriiven v. Turner, Stra. 832. R. v. Land Tax Commissioners, 1 T. R. 147. Estwick v. London (City), Sty. 42. R. v. Patrick, 2 Keb. 167. Northampton’s case, Lofft. 549. Gude’s Cr. Pr. 180. See tits. “Councillor,” “Custos Brevium” (Clerk), “Guardians” (Clerk), “Mint” (Restoration).

(l) R. v. London (Mayor), 2 T. R. 178. A return of “*quamdiu se bene gesserit*,” needs not “*et non diutius*.” R. v. Holt, 3 Keb. 667. See post, tit. “Returns.”

[*175] *The writ will be denied, if the place be a merely *temporary* appointment,^(m) or not permanent, as where the office is held *durante bene placito*.⁽ⁿ⁾ So if the body which appoints, be not a corporate body, but be merely added to, as guardians of the poor, &c., in such case the duration of the appointment is as fluctuating as the office of the appointors, and therefore not such, for which mandamus will be granted.^(o) But in one case, where on the one side, the evidence shewed that the office was not legally holden for life, and on the other, that it had usually been so holden, and that it was accepted on that understanding, the Court granted a peremptory mandamus to command an award of compensation as for an office held for life.^(p)

The writ does not lie for an officer at will,^(q) nor for an officer who is appointed generally, but removable at will,^(r) but it will lie for a corporate officer although the appointment be general, for the Court will look to the nature of the appointment.^(s)

— *Returns*.—It has been held to be a good return to a mandamus, to restore an officer *at pleasure*: that the defendants have chosen another officer, and that thereby the prosecutor was removed; for in such case the election of a new officer has the legal operation of an actual amotion.^(t) So, a return that states merely that the office is one *at pleasure*, and that the prosecutor has been removed therefrom, is good without stating the cause of the removal,^(u) or a notice of removal or summons.^(v) But the return must shew that the will or pleasure to remove has been declared, or the Court will grant restitution.^(w) Thus, where an officer at will was removed, and the corporation did not rely upon its power of amotion, but returned insufficient *matter, a peremptory mandamus was granted [*176] for his restoration.^(vv) But if the prosecutor ought not to be res-

^(m) *Supra*, n. (a). *R. v. Croydon (Churchwardens)*, 5 T. R. 714. *R. v. Patrick*, 2 Keb. 167.

⁽ⁿ⁾ *Dighton v. Stratford (Corp.)*, 1 Sid. 461. S. C. 1 Lev. 291. S. C. 1 Vent. 77. S. C. 1 Vent. 82. S. C. Raym. 188. S. C. 2 Keb. 656. See *Blaggrave's case*, 2 Sid. 49. *Warren's case*, Cro. Jac. 540, and cases there cited. *R. v. Thame (Guardians)*, Stra. 115. *R. v. Slatford*, 5 Mod. 316. *R. v. Tidderley*, 1 Sid. 14; 1 Vent. 77, *supra*. *R. v. London (Mayor)*, 2 T. R. 178, 179.

^(o) *R. v. St. Nicholas Parish*, 4 M. & S. 325. See also 5 T. R. 713, *supra*, n. (f). See tit. "Guardians of Poor" (Clerk).

^(p) *R. v. Norwich (Mayor)*, 8 A. & E. 633.† See tit. "Compensation" (Office).

^(q) *R. v. Oxon. (Mayor)*, Salk. 428, 3, and cases there cited, and see 2 Lev. 18.

^(r) *R. v. Coventry (Mayor)*, 2 Salk. 430. S. C. Ld. Raym. 391. S. C. Holt, 438.

^(s) *Ante*, p. 130. *R. v. St. Nicholas Guardians*, 4 M. & S. 325.

^(t) *Bull. N. P.* 203. *R. v. Canterbury (Mayor)*, Str. 674. *Pepis' case*, 1 Vent. 342. *R. v. Thame (Churchwardens)*, Str. 115. *R. v. Taunton (Churchwardens)*, Cowp. 413. *R. v. Pateman*, 2 T. R. 777. Com. Dig. tit. "Man." D. 3. See *infra*, tit. "Office" (Restoration).

^(u) *Ante*, p. 12—15. *R. v. Cambridge (Mayor)*, 2 Show. 69. *Blaggrave's case*, 2 Sid. 6, 49, 72. *Dighton's case*, Ray. 188. S. C. 1 Sid. 461. S. C. 1 Vent. 77, 82. S. C. 1 Lev. 291, and the cases there cited. S. C. 2 Keb. 641, 641, 656. *R. v. Coventry (Mayor)*, Salk. 430. S. C. Ld. Raym. 391. *R. v. Slatford*, Comb. 419. *R. v. Campion*, 1 Sid. 14, 15.

^(v) *Dighton v. Stratford-upon-Avon*, 2 Keb. 641. See *infra*, "Summons."

^(w) *R. v. Slatford*, Comb. 419. S. C. 5 Mod. 316. See *infra*, "Restoration."

^(vv) *R. v. Oxon. (Mayor)*, 2 Salk. 428, 429, 430. S. C. Holt, 438. *Bull. N. P.* 203. *Whiteacre's case*, Str. 674. *R. v. Tidderley*, 1 Sid. 14; 1 Vent. 77.

tored, the Court will not do so, although the return be insufficient,(w) for it will not grant the writ to do that which is manifestly improper.

The return of a *custom* to remove ad libitum is good, but must be returned positively, and not by way of recital.(x) The Court will not extend such a custom, but on the contrary, will construe it strictly. Thus, a custom that a common councilman may be removed at pleasure is good, but such a custom cannot be extended to an alderman or freeman.(y)

—.] *Fees, Emoluments, &c.*—There must also be annexed to or issuing out of the office fixed fees or emoluments, or a salary.(z) The office must, as before stated, be an office of consequence or value for which there does not exist any specific legal remedy.(a) The value, however, is not scrupulously weighed.(b)

—.] 2nd. *Officers need not be Sworn Officers.*—The writ will be granted for officers, who are not sworn to perform the duties of the offices, as usher of a school; steward of a leet; churchwarden; parish clerk, &c.(c)

—.] *Judicial and Ministerial.*—In some cases, it is stated to be a principle as to the dispensing the writ of mandamus, that it never issues to command officers in their judicial but only in their ministerial capacities;(d) this, as the statement of a principle, is certainly erroneous, for the writ lies to command both judicial and ministerial officers.(e) The form of it in the two cases, is, however, different in this, that when it issues to enforce the exercise of a judicial capacity, it is general in its terms,(f) and not specific. Thus, it would merely require the Judge of an inferior Court “to *adjudicate*,” without specifying what judgment to give; or, in other words “to give sentence,” generally, without saying what sentence;(g) whereas in the case of a ministerial officer, the writ would, in terms, specifically command the performance of [*177]

(w) Ante, p. 12. R. v. Tidderley, 1 Sid. 14. R. v. Griffiths, 5 B. & A. 731.† See infra, “Restoration.”

(x) R. v. Coventry (Mayor), Ld. Raym. 391. S. C. 2 Salk. 430, and cases there cited. See tits. “Councillor” (Restoration Return), “Custom.” See post, tit. “Return.”

(y) R. v. Thame (Churchwardens), Str. 115. R. v. Cambridge (U.), 2 Show. 69. Warren’s case, Cro. Jac. 540. S. C. 2 Roll. 112. Com. Dig. tit. “Man.” D. 3. See tit. “Custom,” and post, tit. “Return.”

(z) Ante, p. 12, n. (r). R. v. Croydon (Churchwardens), 5 T. R. 713. The Protector v. Craford, Sty. 457, per Glyn, C. J. R. v. Dr. Askew, Burr. 2186. See tits. “Lectureship,” “Parson” (Salary), “Physicians’ College,” “Reading” (Steward).

(a) Ante, p. 18—27. R. v. Cambridge (U.), 1 W. Blac. 552. S. C. Burr. 1647.

(b) Ante, p. 12, n. (r). R. v. Barker, Burr. 1265. Bac. Abr. tit. “Man.” 257. R. v. Oxenden, 1 Show. 263.

(c) City Works case, 2 Sid. 112, per Glyn, C. J. Stamp’s case, 1 Sid. 40. The Protector v. Craford, Sty. 457. Le Parish of St. Balaunce case, Palmer, 50. See tits. “Churchwarden,” “Manor” (Leet Steward), “Parish Clerk,” “School” (Usher).

(d) R. v. Montacute (Lord), 1 W. Blac. 61. S. C. 1 Wils. 283. R. v. Ely (Ep.), 2 T. R. 290. S. C. 1 W. Blac. 90, n. (h).

(e) Ante, p. 12.

(f) 1 W. Blac. 62. S. C. 1 Wils. 283, supra, n. (d), and see post, tit. “Writ” (Mandatory Clause).

(g) See stat. 12 Geo. 3, c. 21, s. 1, and see R. v. Litchfield (Ep.), 7 Mod.

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Notwithstanding the writ issues to command all inferior officers to do their duty; yet it has been settled, upon the authority of several cases, that the Court will not grant the writ to command an *inferior ministerial* officer to execute the duties of his office, when the officer, as such is subject to another authority, by whom he can be punished for his neglect, and with whom there is no collusion. Thus, the writ does not lie to command the treasurer of a county to obey an order of the Court of Quarter Sessions, both because he is the mere servant of such sessions, and amenable to them, and also that the proper remedy in such case is by indictment; and Lord Kenyon, in delivering his judgment, remarked; it has been often said by Lord Mansfield, that a mandamus is a very beneficial writ, and that the best method of preserving it, is to be sparing in the use of it;" and added, "that the Court had no difficulty, upon a proper case laid before them, in granting a mandamus to justices to make an order, when they refuse to do their duty; but it would be *descending too low* to grant a mandamus to their officer to obey that order; and that the Court might as well issue such a writ to a constable, or other ministerial officer, to compel him to execute a warrant directed to him."(*h*)

So the Court of B. R. will not, by mandamus command other inferior ministerial officers to do their duties; as a serjeant-at-mace;(*i*) or an apparitor;(*j*) for these are servants to their respective Courts, and punishable by the Judges of them, and for the superior Court to interpose in obliging such inferior officers, would be to usurp the authority of the inferior Court which has a proper jurisdiction over its own officers, and which alone is answerable to the superior Court for the execution of such authority.(*k*)

—.] *Deputy; Admission.*—The writ will not be granted to command the appointment or admission of a deputy, to a place or office which cannot be exercised by deputy.(*l*) But if there be a legal power to constitute a deputy in such a case, a writ will be granted for hindering one [*178] who may lawfully make, in making a deputy, because there is no other remedy; but to such a writ returns of "no power to make deputy;" "deputy not duly appointed;" or that "deputy is insufficient," would be good.(*m*)

218. S. C. Kel. 287. S. C. 2 Barn. 365, 429. See *infra*, "Ministerial," and post. tit., "Writ" Mandatory Clause.)

(*h*) Ante, p. 12. See tits. "Constable," "County," (Treasurer), ante, p. 103, 104; 3 A. & E. 481,† per Littledale J.; 5 T. R. 364. R. v. Bristow, 6 T. R. 168, cited in R. v. Jeyes, 5 N. & M. 103.† S. C. 3 A. & E. 416.† R. v. Payn, 6 A. & E. 397.† S. C. 1 N. & P. 524.† R. v. Shaw, 5 T. R. 549; and see 1 Chit. 650; Bull. N. P. 195. See *supra*, "Judicial."

(*i*) See tits. "Serjeant of Mace." (*j*) See tit. "Apparitor," p. 42.

(*k*) See ante, p. 112, "Common Pleas Officers," and post, p. 178. R. v. Wiltshire anal, 5 N. & M. 349.† Bac. Abr. tit. "Man." (D.) See tit. "Proctor."

(*l*) R. v. Gravesend (Mayor), 4 D. & R. 117,† and 3 A. & E. 776,† as to when deputies may be appointed. R. v. Gravesend (Mayor), 2 B. & C. 602.† See tits. "Deputy Officer," "Marches," "Recorder" (Deputy,) Registrar of Archbishop's Court," "Registrar of Bishop's Court," *infra*, "Admission," and post, p. 178, n. (*r*).

(*m*) R. v. Win, 2 Keb. 738, 742, 743. S. C. 1 Lev. 306, 307. S. C. 1 Vent. 110,

—.] *Restoration*.—The writ lies also to command the restoration of a deputy to his place, if illegally deprived. Thus, if an office be granted to A. exercendum per se vel sufficientem deputatum, if the deputy be removed, a mandamus by A. lies to restore his deputy.(*n*)

—.] *Application*.—The writ will not, however, be granted on the application of the deputy himself, because his authority is revocable at the will of the person who appointed him, but will be granted either to admit or to restore such deputy, on behalf of the party having the power of appointing such deputy; for his freehold is concerned, and he has no other remedy.(*o*)

—.] *Officers of Courts*.—Officers whose offices are incident to Courts partake of the nature of the several and respective Courts for which they are appointed, and which they attend, and the Judges, or those who have the supreme authority in such Courts, are the proper persons to censure any misbehaviour; and should they be mistaken, the Court of B. R. cannot relieve; for in all cases where such Judges, &c. keep within their bounds, no Court can correct their errors in proceedings, and if wrong be done, the party injured must appeal.(*p*)

—.] *Ecclesiastical*.—The Court of B. R. has no jurisdiction to grant mandamuses in respect of officers purely belonging and subject alone to the Ecclesiastical Court;(q) but it lies in some instances though the office be subject to the Ecclesiastical Court, and notwithstanding the officer be a deputy merely, if there be no visitor.(*r*)

—.] *Spiritual Officer*.—The Court will grant a writ of mandamus to admit or restore the applicant to a spiritual office, if of a public nature, and for which there is not a legal remedy.(*s*) Thus it has been granted to induct to a cathedral stall.(*t*)

*—.] 3rd. *Election*.—Wherever a political necessity exists, or a duty be shewn, to fill up a municipal or other office by elec- [*179]

111. Anon. 1 Barn. 252. Com. Dig. tit. "Man." (A.) Bac. Abr. tit. "Man." C. See R. v. Roberts, 3 A. & E. 776,† and tit. "Marches," &c.

(*n*) R. v. Marches (President), 1 Lev. 306, 307. S. C. 1 Vent. 110, 111, supra. See R. v. Roberts, 3 A. & E. 776,† (as to when a deputy may be appointed). Com. Dig. tit. "Man." (A). See tit. "Marches."

(*o*) Ante, p. 18, 27. R. v. Marches (President), 1 Lev. 306, 307. S. C. 2 Keb. 738, 742. S. C. 1 Vent. 110, 111. R. v. Dr. Ward, 1 Barn. 295. S. C. 1 Barn. 380, 411, 412. S. C. Stra. 896. See tits. "Marches."

(*p*) See ante, p. 9, 21, 105; 3 Mod. 335, supra; 1 Show. 263, n. (*a*), supra; Carth. 170. See tits. "Courts Superior" (Common Pleas), "Proctor." Supra, p. 177, n. (*i*) (*j*).

(*q*) Ante, p. 22. R. v. Dr. Ward, Barn. 295. R. v. Canterbury, (Archbp.), 8 East, 218. R. v. Chester, (Ep.). 1 W. Blac. 24. S. C. 1 Wils. 206. See also tits. "Apparitor, &c." "Proctor," "Registrar of Archbishop's Court."

(*r*) R. v. Morpeth (Bailiffs), T. 3 Geo. 1, Stra. 58. R. v. Ward, Stra. 897, and cited in R. v. London (Ep.), 1 Wils. 14. S. C. Stra. 1192; Sel. N. P. 1083, 11th edit. And see tits. "Apparitor General, &c.," "Prebendary," "Visitor." Ante, p. 177, n. (*l*).

(*s*) Ante, p. 12, 18—27. Gude's Cr. Pr. 180. See supra, (Public).

(*t*) See tit. "Canon," "Cathedral Stall," "Prebendary." Sir, T. Jon. 199. R. v. Dublin (Dean), Stra. 542. R. v. Morpeth (Bailiffs), Stra. 897; 3 Blac. 110.

tion, &c., the Court of B. R. will interfere, by mandamus, and command it.(u)

— *Definite Number.*—Thus it is clear that where, by act of Parliament, letters patent, charter, or prescription, a municipal body ought to consist of a definite number, and they neglect to fill up the vacancies as they occur, the Court will grant a mandamus for that purpose.(v) But it does not lie to command an election of members of a body, the number of whom is indefinite; for the writ issues only in cases of necessity, and to supply a defect of justice.(w) Thus where a charter authorized the mayor, &c. of a corporation from time to time, and at all times thereafter, as often and when to them should seem fit and necessary to nominate, choose and prefer, *so many and such persons* to be free burgesses, &c., as they pleased; the Court of B. R. refused to grant a mandamus either to proceed to the election of free burgesses, or to command the holding of a meeting for the purpose of considering the propriety of proceeding to such an election, in order to fill up vacancies in the aldermanic body and the then existing body of free burgesses respectively; because the power given to the corporation was purely discretionary; it being clearly settled, that a mandamus does not lie to command the doing of that, the doing or omission of which is the subject of pure discretion.(x)

It seems that the Court of B. R. has, in order to prevent a defect of police or government, exercised a common law jurisdiction, and issued the writ to command the filling up of vacancies in municipal bodies, occasioned otherwise than by the want of an election on the charter day.(y) So also [180] by virtue of stat. 11 Geo. 1, c. 4, s. 4, the Court will command, if necessary, an *election of the annual as well as the head officer, and all the necessary constituent parts of a municipal corporation.(z) The

(u) *Breedon v. Gill*, 5 Mod. 275. *R. v. Robinson*, Stra. 555. *R. v. Fowey (Mayor)*, 4 D. & R. 138.† S. C. 2 B. & C. 587.† And see stats. 9 Anne, c. 20, 11 Geo. 1, c. 4, 5 & 6 Wm. 4, c. 76, and 1 Viet. c. 78, s. 26, App. Bull. N. P. 197, and cases there cited; Bac. Abr. tit. "Man." (D.); 3 Bl. Com. 265; 3 Steph. Com. 684. See tits. "Alderman" (Election), "Bailliff" (Election), "Burgess" (Election), "Chamberlain" (Election), "Churchwarden" (Election), "Corporation Municipal" (Duties, &c.), "Councillor" (Election), "Guardians of Poor" (Election), "Jurats" (Election), "Lectureship" (Lecturer), "Mayor" (Election), "Overseers" (Election), "Parish" (Officers, Election), "Parish Clerk" (Appointment), "Portreeve" (Election), "Prebendary" (Election), "Recorder" (Election), "Sexton" (Election), "Sidesman" (Election), "Town Clerk" (Election). See ante, p. 9—12.

(v) Ante, p. 11, 37. *R. v. Fowey (Mayor)*, 4 D. & R. 135.† S. C. 2 B. & C. 587.† Bull. N. P. 201. See tits. "Alderman" (Election), "Mayor" (Election).

(w) Ante, p. 10, 11; 2 B. & C. 587.† S. C. 4 D. & R. 132,† supra. *R. v. Pate-man*, 2 T. R. 777; Bull. N. P. 201. No case can be found to the contrary; 4 D. & R. 137,† per Abbott, C. J. See 5 D. & R. 614.† *R. v. Eye (Bailiffs)*, 2 D. & R. 172; † 1 B. & C. 85; † 4 B. & A. 271; † Bac. Abr. tit. "Man." (D.) See tit. "Alderman" (Election), "Burgess."

(x) Ante, p. 12, 13; 4 D. & R. 132.† S. C. 2 B. & C. 587,† supra. Com. Dig. tit. "Man." B. 1. See tit. "Alderman" (Election), "Burgess" (Free Burgess, Election).

(y) Ante, p. 5. *R. v. Phippen*, 7 A. & E. 968.† See stat. 9 Anne, c. 20, App. See tits. "Alderman" (Election), "Capital Burgess" (Removal), "Mayor."

(z) See stat. App., and stat. 19 Geo. 2, c. 12, (1.), App. *R. v. Malden, Burr*. 2132. *R. v. Woodrow*, 2 T. R. 732. *R. v. Oxford (Corp.)*, Cas. t. Hard. 177, citing

Court of B. R. has also the power of awarding a mandamus by virtue of the stat. 7 Wm. 4 & 1 Viet. c. 78, s. 26, *(a)* (extending the provisions of stat. 11 Geo. 1, c. 4, which has been held to apply to the cases hereafter mentioned,) where there has been no election, or the election was void; but not where the party is supposed to have forfeited his title for a cause subsequent to the election. *(b)* Thus the Court will command a corporation to go to an election of a corporate officer, in the stead of one against whom judgment of ouster has been signed; *(c)* or it may grant the writ in the first instance, without waiting for such ouster, because the mandamus concludes nothing; for on the trial, the validity of the elections may be gone into. *(d)* So it lies to proceed to an election, where there is a clause to hold over. *(e)*

The Court will also grant the writ to proceed to an election &c., where there has been one *de facto*, the validity of which is disputed; the office not being full *de facto* of either party; in order that the title of the contending parties may be tried on the return. Thus, where two persons claimed to have been legally elected to the office of recorder of a borough, and the municipal Court had certified the election of one of them to the Secretary of State, for the approbation of the Crown; the Court of B. R. thought it a proper case for a mandamus, to command the corporation to put the corporate seal to a certificate of the election of the other; the certificate being only a step towards the completion of the title, the Crown not having, at the time of the motion, signified its approbation of him whose election had been certified. *(f)* But the writ will, in such cases, be granted only to elect officers in the stead of those improperly elected; *(g)* or ousted by *quo warranto*; *(h)* and not also to elect others in the room of those duly elected, *although the latter were elected at [*181] the same time with those so improperly elected. Such writ will also be

Bossiney's case, *Stra.* 1003. *R. v. Bridgenorth*, 2 *Chit.* 256. *Scarborough's case*, *Stra.* 1180. *Com. Dig.* tit. "Man." (A.) (C. 2). *Bac. Abr.* tit. "Man." (D.) *R. v. Thetford (Mayor)*, 8 *East*, 278. See the titles of the several municipal officers throughout this series, and also stat. 6 & 7 Viet. c. 89, App.

(a) See stat. App.

(b) *R. v. Phippen*, 7 A. & E. 968.† *Bac. Abr.* tit. "Man." (D.)

(c) *R. v. West Looe (Corp.)*, *Burr.* 1386, 1387. *R. v. Pindar*, 8 *Mod.* 235. *S. C.* *Stra.* 582, 625, 627. *S. C. Ld. Raym.* 1447. *S. C.* 8 *Mod.* 332, where see return of an ouster. See tit. "Mayor."

(d) *R. v. Bridgewater (Corp.)*, 3 *Doug.* 381;† *Sayer*, 211; *Burr.* 1454; 2 *T. R.* 259; 4 *T. R.* 699; 6 *East*, 360. See tit. "Peremptory Writ" (Effect).

(e) *R. v. Helston (Mayor)*, *Stra.* 555. *Com. Dig.* tit. "Man." (A.)

(f) 3 *Steph. Com.* 682. *R. v. York (Mayor)*, 4 *T. R.* 699. *R. v. Oxford (Mayor)*, 6 A. & E. 353.† *R. v. Leeds (Mayor)*, 11 A. & E. 512.† See stats. 11 Geo. 1, c. 4, 7 Wm. 4 & 1 Viet. c. 78, s. 24, and 19 Geo. 2, c. 12, (I.), App. *R. v. London (Mayor)*, 1 *T. R.* 146. *R. v. Leyland*, 3 M. & S. 184. *R. v. Norwich*, 1 B. & Ad. 310.† *Bac. Abr.* tit. "Man." C. *R. v. St. Luke's*, 2 N. & M. 464.† See tits. "Churchwarden" (Admission), "Councilman" (Election), "Mayor" (Election).

(g) *Ante*, p. 10. *R. v. St. Pancras*, 1 A. & E. 80.† See tit. "Vestry (Holding)."

(h) *R. v. Pindar*, 8 *Mod.* 235. *S. C. Stra.* 582, 625, 627. *S. C. Ld. Raym.* 1447. *S. C.* 8 *Mod.* 332, 334, where see a return of ouster. *R. v. London (Mayor)*, 1 *Show.* 280. *S. C.* 4 *Mod.* 58; 6 *Com. Dig.* "Quo Warranto," (C. 5.) See *ante*, tit. "Mayor" (Election).

granted after an election *de facto*, if such election be merely *colourable*, and *clearly void*, and in some cases notwithstanding the office may be full *de facto*; for the words "*no election*," in the stat. 11 Geo. 1, c. 4, s. 2, mean "no due legal valid election;(i) if, however, the officer be actually sworn in, or if the validity of the election be merely doubtful or questionable, the Court may think it proper, and direct that the right of the officer *de facto* should be tried first by a *quo warranto* information; but if it be clear that there has been merely a *colourable*, and therefore void election; the officer so elected, obtains no *estate* in the office, and the Court of B. R. will award a writ, upon the above statutes, to go to a new election, and not await any controversy about the former one;(j) notwithstanding, as before stated, such wrongful officer may be in possession.(k)

The law upon this point is shortly this: that a mandamus will be granted to elect or to permit an exercise of office; but not to restore, where the office is already full (*de facto*), by what is called a void election, although the office be such that the right to it *cannot* be tried by a *quo warranto* information; for in such cases the Court will, if they be satisfied that the election is void, so treat it, and issue a mandamus to proceed *de novo*;(l) notwithstanding the applicant may claim under the same election with the officer *de facto*.(m) So if two or more applicants shew to the Court of B. R. a *colourable* title only, to offices *not* the subject of a *quo warranto* information, such Court will grant a mandamus to each or all of them, in order to give them an opportunity of litigating their rights, and will not decide on the title, on shewing cause to the rule nisi.(n) To such writs a return of a *plenarty* is, therefore, bad.(o) But

(i) See such act, and also 19 Geo. 2, c. 12, (I.), App. R. v. Cambridge (Mayor), Burr. 2008, per Ld. Mansfield, C. J. Borough of Bossiney's case, Stra. 1002. R. v. Carmarthen (Mayor), or R. v. Newsham, Say. 211. R. v. Bankes, Burr. 1454. R. v. Colchester (Mayor), 4 Doug. 14.† R. v. Land Tax Commissioners, 3 T. R. 149. Bac. Abr. tit. "Man." (D.) See tits. "Councilman" (Election), "Mayor" (Election).

(j) Case of Aberystwith, Stra. 1157, and see Stra. 1003, 1180.

(k) Scarborough's case, Stra. 1180. See tit. "Mayor" (Election).

(l) Ante, p. 26, 27. R. v. Stoke Damerel, 5 A. & E. 584;† 2 H. & W. 346. S. C. 1 N. & P. 60,† per Patteson, J., citing 1 East, 79, supra; Burr. 1454. S. C. 1 W. Blac. 444, 451; Burr. 2008. Bossiney's case, Stra. 1003; 2 T. R. 259, and 7 A. & E. 254, supra. R. v. Bedford Level (Corp.), 6 East, 356. Ex parte Thatcher, 1 D. & R. 426.† R. v. Land Tax Commissioners, 1 T. R. 146. See also R. v. Exeter (Chapter), 12 A. & E. 527.† R. v. Shepherd, 4 T. R. 381. R. v. Davie, 6 A. & E. 386;† 7 A. & E. 254,† and see cases 1 N. & P. 474.† S. C. 6 A. & E. 349;† 3 A. & E. 467.† See tit. "Mayor" (Election).

(m) Ante, p. 180; 2 T. R. 259. R. v. Barker, Burr. 1265. Com. Dig. tit. "Man." (B.)

(n) R. v. Middlesex (Archdeacon), 3 A. & E. 616.† R. v. Birmingham (Rector), 7 A. & E. 256.† R. v. Lyme Regis (Mayor), 1 Doug. 80, 84; 6 East, 356. See tit. "Churchwarden" (Election). See post, tits. "Application," "Rule."

(o) Co. Litt. 344, b. R. v. Ward, Fitzg. 195. Boswell's case, 6 Rep. 48, b. R. v. Exeter (Chapter), 12 A. & E. 526, 530.† R. v. Cambridge (Mayor), Burr. 2008. See R. v. Bedford Level, 6 East, 356. R. v. St. Pancras, 1 A. & E. 80.† R. v. Birmingham (Rector), 7 A. & E. 258.† And see R. v. Shepherd, 4 T. R. 381. See post, tit. "Return."

it has been held to be a good return to such a writ, *that there has been an election, thereby meaning a valid election.(p) So is [*182] a return of non fuit electus.(q)

But if a candidate have been rejected or ousted of an office by the election of another person to that office, such election not being merely *colourable*, but *prima facie good*, or even *doubtful*, and the right to such office can be tried by an information in the nature of a *quo warranto*, he must take such remedy against the party holding the office *de facto*, for in such a case, a *mandamus* will not be granted, it not being the proper process for ousting an usurper.(r) For the writ as before stated is not grantable where there is another specific legal remedy by *quo warranto* information.(s) So that to a *mandamus* founded upon such facts, a return of a *plenarty* is good.(t)

Where the *mandamus* is sought for to fill up an office, on the ground that the election to it is a nullity, such nullity must be very clearly made out.(u) Thus where it appeared by affidavit, that one of two candidates for an office had a majority only by means of illegal votes, the Court granted the writ to admit and swear the other who appeared upon the affidavits to have the greater number of legal votes, and this although the former was admitted and sworn into the office, there being no other specific, or at least no other such convenient mode of trying the right.(v)

But where an office is full by the appointment of the person who *prima facie*, or ordinarily has the right of appointment, and where there are means of trying the title by action, as by refusing to pay the fees, &c., the Court will not grant a *mandamus* against the party filling the office in order to try the title, especially where it is doubtful, whether or not an information in the nature of a *quo warranto* will lie for the usurpation of such office.(w) So, that the prosecutor must make out a very strong claim before the Court will grant a *mandamus* in such case.(x) But if

(p) *R. v. Williams*, Say. 140.

(q) *Ante*, p. 72. *R. v. Ward*, Fitzg. 195.

(r) *Ante*, p. 26, 27. *R. v. Stoke Damerel*, 5 A. & E. 589.† S. C. 1 N. & P. 56.† *R. v. Oxford* (Mayor), 1 N. & P. 474.† S. C. 6 A. & E. 349.† *R. v. Davie*, 6 A. & E. 386. *Ex parte Thatcher*, 1 D. & R. 426.† *R. v. Beedle*, 3 A. & E. 467,† confirming *R. v. York* (Mayor), 4 T. R. 699. *R. v. Colchester* (Mayor), 2 T. R. 259. *R. v. Bedford* (Corp.), 1 East, 79. *R. v. Bedford Level*, 6 East, 356. *R. v. Birmingham* (Rector), 7 A. & E. 255.† *Bossiney's case*, Stra. 1003. *R. v. Banks*, Burr. 1454. S. C. 1 W. Blac. 444, 451, where see form of rule. *R. v. Cambridge* (Mayor), Burr. 2008. *R. v. Chester* (Mayor), 1 M. & S. 101. *R. v. Attwood*, 4 B. & Ad. 482,† and cases there cited. *R. v. Exeter* (Chapter), 12 A. & E. 526, 530.† *R. v. Williams*, Say. 140; Bac. Abr. tit. "Man." (C.) See tits. "Councillor" (Election), "Mayor" (Election).

(s) *Ante*, p. 26, 27. *R. v. Bedford Level*, 6 East, 358; 3 A. & E. 460, 473,† *supra*. *R. v. Chester* (Ep.), 1 T. R. 396.

(t) Co. Litt. 344 b.; 6 Rep. 48 b. *R. v. Banks*, H., 4 Geo. 3, Burr. 1452; 12 A. & E. 526, 530,† *supra*; Com. Dig. tit. "Man." (B.) As to what is a *plenarty*, see 11 A. & E. 512.† See *ante*, p. 181, n. (o).

(u) 6 A. & E. 386,† *supra*.

(v) *Ante*, p. 18; 6 East, 356, *supra*; 2 Smith, 535. See post, tit. "Application."

(w) *Ante*, p. 20, 24, 26, 27. *R. v. Stoke Damerel* (Minister), 1 N. & P. 56.† S. C. 5 A. & E. 584.† S. C. 2 Har. & W. 346.

(x) 1 N. & P. 58.† See tit. "Application."

[*183] the office be full by an *appointment clearly made without any authority, the writ will be granted, though generally a plenarity is an objection to such a proceeding.(y)

So the Court will refuse such a writ when applied for, in order to raise a question against *usage*, as whether the election of certain municipal officers ought or ought not to be annual; although, such usage be clearly contrary to the words of the charter, if there be another remedy open to the applicants or where the words or construction of such charter, are in any degree doubtful. Thus where a charter of incorporation of Hen. 7, granted to the citizens and commonalty in these words, "volumus etiam damus et concedimus pro nobis et heredibus nostris, praefatis civibus et communitati heredibus et successoribus suis: quod ipsi et successores in perpetuum SINGULIS ANNIS SUCCESSIVIS viginti quatuor concives civitatis praedictae in aldermannos, nec non quadraginta alios eives ejusdem civitatis pro communi consilio civitatis illius eligere facere et creare POSSINT." It appeared that in 1693, and the two following years, successive elections of the forty common councilmen had been made; since which time the usage had been not to elect the aldermen or councilmen annually;(z) the Court refused a writ of mandamus, which was applied for in order to raise a question against such usage.

So, if a peremptory writ be granted for one, there can be no mandamus for another until the election has been tried, upon the pretence that the latter was well elected and the former mandamus gained by artifice.(a)

Where an election is incomplete, or irregularly conducted, the writ lies to command an entry of an adjournment of an election meeting, and to proceed to complete the election.(b) But the Court will not grant a mandamus to summon the individual persons who were summoned for a jury on a former day to proceed to election.(c) So, the writ also lies to command municipal officers to proceed in a scrutiny of the poll in the election of their corporate members.(d)

There is no precedent, in the case of an election, of a mandamus having been granted to command a returning officer to make a new return.(e)

——. *Notice of Application, &c.*—By stat. 6 & 7 Viet. c. 89, s. 5, ten days' notice in writing should be given of the intended application(f)

(y) Ante, p. 181, n. (o); 5 A. & E. 586,† supra; R. v. Colechester (Mayor), 2 T. R. 259, and see R. v. Bedford Level, 6 East, 536.

(z) Ante, p. 18—27. R. v. Chester (Mayor), 1 M. & S. 101. R. v. Attwood, 4 B. & Ad. 482, 483, 495.† R. v. Salway, 9 B. & C. 432, 435;† Stra. 1180. See tits. "Custom," "Manor" (Custom, License). See post, tit. "Application."

(a) 2 Jon. 215; Com. Dig. tit. "Man." (B.) See post, tit. "Writ" (Concurrent), "Peremptory Writ."

(b) R. v. St. Luke's (Vestrymen), 2 N. & M. 464.† See tit. "Vestry."

(c) R. v. Bankes, Burr. 1452. S. C. 1 W. Blac. 452; Com. Dig. tit. "Man." (B.) See tit. "Jury."

(d) R. v. Everet, Cas. temp. Hard. 261.

(e) R. v. Heathcote, 10 Mod. 49, 54. But see tit. "Alderman" (Election).

(f) See stat. App. In cases of the election to corporate offices, it is well to follow that statute strictly. As to Ireland, see stats. 19 Geo. 2, c. 12 (I.); 9 & 10 Vict. c. 13 (I.), n. (a). See post, tit. "Application" (Notice).

to the Court for a writ to proceed to the election of any corporate officer of a *borough in *England or Wales*. A burgess had been held [*184] not to be a corporate officer within the above statute.(g)

— *Affidavits and statement of grounds of motion*, see Requirements of stat. 6 & 7 Vict. c. 89, App.

— *Application ; Priority of Motion*. Where a defendant is ousted on a quo warranto, the prosecutor of such information is entitled to priority of motion for mandamus for a new election, if he apply within a reasonable time, if he do not do so, then, and not before, the defendant is entitled to move for it;(h) if, however, the prosecutor be quite prepared to move, and only stay till his judgment of ouster be signed, he does not thereby lose his priority of motion, nor if another person, in order to get priority, employ a counsel, who has pre-audience of the prosecutor's counsel.(i)

The Court of B. R. will not, either in municipal or in such parish, on a motion for a mandamus to elect, &c., investigate the title of electors, who have for some time exercised their office, especially when objections are taken to the title of each individual.(j)

Since the stat. 11 Geo. 1, c. 4, for obliging municipal corporations to elect officers, it has been held, that the Court of B. R. has a discretionary power to refuse a writ for that purpose, and that it will first receive information as to the election, and if dissatisfied about the right, will send the parties to try it on a quo warranto information.(k)

In all cases within the stat. 6 & 7 Vict. c. 89, which applies to the ejection of municipal officers, it is enacted, that the defendant may shew cause in the first instance against such application, and if no sufficient cause be shewn, that it shall be lawful for the Court of B. R. on proof of due service of such notice and statement, and of the delivery of a copy of the affidavits, to make the rule for such mandamus absolute, if the said Court shall think fit in the first instance.(l)

— *Rule*.—As to the rule in cases of the election of municipal officers, it is by stat. 6 & 7 Vict. c. 89,(m) enacted, that the Court may, if it shall so think fit, make the rule for such mandamus absolute in the first instance, or direct that any writ of mandamus thereby ordered to be issued, shall be peremptory in the first instance.

If the Court have proposed to try an election by a feigned issue, or to proceed to a new election, and if one party refuse it, the Court will insert such refusal in the rule, that it may appear authentically to the jury on

(g) *Re Milner*, 13 L. J., N. S., M. C. 186. See tit. "Burgess."

(h) *R. v. McKay*, 4 B. & C. 658.† *R. v. West Looe (Corp.)*, Burr. 1386. *R. v. Wigan (Corp.)*, Burr. 782. See post, tit. "Application" (Motion).

(i) See note (h), supra.

(j) *R. v. Dolgelly Union*, 8 A. & E. 561.† S. C. 3 N. & P. 542. *In re Aston Union*, 6 A. & E. 784.† *R. v. Ramsden*, 3 A. & E. 456.† See post, tit. "Application." As to Municipal Elections, see stat. 1 Vict. c. 78, s. 1, App.

(k) Ante, p. 13—15, 26, 27. *R. v. Tintagel (Mayor)*, Stra. 1903, 1157; *Andr. 280*; *Bac. Abr.* tit. "Man." (E.)

(l) See stat. App.

(m) See stat. App.

the trial.(n) The rule to elect should be "to proceed to an election and [*185] ^{*not to elect a particular person.}"(o) The Court will not order a day for the election to be inserted in the rule, but will leave that to the proper officer.(p)

— *Writ, Form of.*—The writ, in form, is to proceed to an election to the office generally, and not to elect a particular person;(q) for the Court of B. R. has no power to command the election of a particular person, unless such person be by act of Parliament or otherwise specially named as the person to be elected.(r)

The Court will not fix the day for the election, in order that it may be inserted in the writ;(s) for the Court will leave that for the proper officer, and if he do wrong, application should be made to the Court.(t)

—]. 4th. *Admission.*—The writ lies to command admission to the exercise of the duties of an office, if the applicant be duly entitled;(u) as to the office of a common councilman, &c.(v) But if there be a custom that no person shall be elected to or serve an office for more than two years successively, the Court will not grant a mandamus to admit a person who has been elected to serve for a third or fourth year.(w) So where there is an ascertained defect in the title of him who applies for admission to an office, the Court will not admit him, for he may be ousted immediately.(x)

But the writ will be granted, although the applicant may have never had possession of his office; for if he have had possession, and be ousted, then the writ must be "to restore, &c."(y) It is not, however, a ground for refusing a mandamus to admit a party to an office to which he has been elected, that to a similar mandamus, granted in respect of a former election of the same party, a return was made shewing an excuse, valid in point of law, for not admitting him, for he may have gained a qualifi-

(n) R. v. Barker, Burr. 1265; Com. Dig. tit. "Man." (A.). See tit. "Feigned Issue."

(o) Shuttleworth v. London (City), 2 Bulst. 122; 2 Roll. 456; Com. Dig. tit. "Man." C. 2. See post, tit. "Writ" (Mandatory Clause.)

(p) Ante, p. 38, n. (v).

(q) 2 Bulst. 122; 2 Roll. 456. See post, tit. "Writ" (Form).

(r) Roll. Abr. tit. "Restitution," 5. See tits. "Act of Parliament," "Churchwardens."

(s) Ante, p. 38, n. (v). Borough of Evesham's case, Stra. 949; Anon. 2 Barn. 236; Com. Dig. tit. "Man." C. 2.

(t) R. v. Bridgenorth (Mayor), 2 Chit. 256.† See tit. "Burgess."

(u) Ante, p. 12, 27, 28. R. v. Gloucester (Ep.), 2 B. & Ad. 158.† R. v. Dolly (Union), 8 A. & E. 562.†

(v) R. v. Dublin (Dean), Stra. 539, per Eyre, J. And see the several titles throughout this work, supra, p. 179, n. (u).

(w) Ante, p. 27, 28. R. v. London (Mayor), 1 T. R. 423; Com. Dig. tit. "Man." (B.). See tit. "Custom."

(x) Ante, p. 27, 28; 3 B. & Ad. 264;† 1 T. R. 423, supra. See tit. "Burgess" (Admission, &c.)

(y) Ante, p. 80. R. v. St. John's Coll., Comb. 238. S. C. Holt, 437. S. C. 4 Mod. 368; Anon. Sti. 299; Com. Dig. tit. "Man." (A.). See infra, "Restoration," and tits. "Alderman" (Admission), "Burgess" (Admission), "Churchwarden" (Admission).

cation subsequently.(z) Nor is it a good return to such a writ that the office is full, for a mandamus gives no right, but only a possession, in order to try the right.(a) But it is a good return that the prosecutor has refused to be admitted.(b)

*—*Application.*—The Court will more readily grant an application to admit than one to restore. The former is conceded [*186] in most cases, in order to enable the applicant to try his right, without which he would be deprived of all legal remedy.(c) The applicant must, however, make out a *prima facie* right to the office, the nature of which must be shewn;(cc) and shew at least that he has complied with all the forms necessary to constitute that right.(d) Thus a mere statement by applicant that he *supposes* he was elected for life, is not sufficient; he must shew the grounds for it.(e)

—*Affidavits.*—The Court will not grant a mandamus to admit to an office *not known to the law*, unless the nature of it be specially stated, in order that the Court may see that it is such an one for which the writ lies.(f) And it is not sufficient that the affidavit positively states that the office is a public one, for it should proceed to show how it is so, by specifically alleging the nature of the duties;(g) but although some of the circumstances stated may seem to shew the office to be a private one, yet, if the affidavits which state it to be a public one are not denied, the Court will and ought to grant the writ, as they will be better able to judge of the matter on the return.(h)

The affidavits must also positively shew the fact of election.(i) Thus in a case where it was merely alleged that he (the prosecutor) had *been informed that he had been elected*, the Court refused the rule; but ultimately, there being an affidavit of an application and refusal to allow inspection of the Court books, granted the rule.(j)

(z) Ante, p. 27, 28. R. v. London (Mayor), 1 N. & M. 285.† S. C. 3 B. & Ad. 255.† See post, p. 188, n. (x).

(a) Ante, p. 181. R. v. Ward, Stra. 893. R. v. Ely (Ep.), 1 W. Blac. 57. S. C. 1 Wils. 266. See supra, "Election," as to difference between offices which are and are not the subjects of *quo warranto*. See post, tit. "Peremptory Writ" (Effect).

(b) R. v. Jorden, 9 Geo. 2, Bull. N. P. 201. See post, 192, n. (f), (g).

(c) R. v. Jotham, 3 T. R. 578; 1 W. Blac. 25, n. (o), 2nd edit.; Com. Dig. tit. "Man." (A.) Infra, "Restoration," and post, tit. "Application."

(cc) Anon., 6 Mod. 316. See supra, "Election." Ante, p. 27, 28.

(d) Ante, p. 27, 28; 3 T. R. 575; 3 B. & Ad. 264,† supra.

(e) 3 T. R. 578, supra.

(f) Ante, p. 174. Anon., 6 Mod. 316, and cited in R. v. London (Mayor of), 2 T. R. 179; 3 B. & Ad. 264;† 4 Com. Dig. 209. Schriiven and Turner's case, Stra. 832; Bac. Abr. tit. "Man." (C.)

(g) Anon., 1 Barn. 153. See tit. "Ashburton" (Eight Men of).

(h) Ante, p. 173. R. v. London (Mayor), 2 T. R. 182, n. (b). R. v. Dr. Ward, Fitzg. 123.

(i) Bull. N. P. 200. R. v. Harewood, 2 East, 177, and see 2 Mod. 316; Bac. Abr. tit. "Man." (C.)

(j) Ante, p. 118, n. (v); 3 T. R. 578. R. v. Vintners' Company, Bull. N. P. 200. See tit. post, "Application" (Affidavits).

——. *Rule*.—The rule for a writ to admit, will, in case the right appear plain, be granted absolute in the first instance.(*k*)

——. *Writ, Form of*.—The office must be properly described in the writ, or the variance will be fatal.(*l*)

——. *Return; Traverses*.—The return may traverse all or any of the traversable allegations contained in the writ.

——. *Incapax; Not Qualified, &c.*—But it has been held not to be a good return to state that the defendant was “*incapable*” of being, or “*not qualified*” to be elected; for the proper way to try such points is by an information in the nature of a quo warranto.(*m*)

[*187] *——. *Non Fuit Electus*.—It has been held, that to a mandamus to admit to an office, containing a suggestion of due election, a traverse of such suggestion, is a good and sufficient answer, and a proper way of putting in issue the title of the applicant; for it may be that the application for the mandamus is made by a perfect stranger, and there must be some general way of traversing the title he sets up.(*n*) And such a traverse is good, notwithstanding it does not show wherein an election, if one were had, was rendered void, &c.(*o*)

——. *Condition Precedent; Oaths*.—So, if the taking of certain statutory oaths are a condition precedent to admission, the omission so to do will form a good return; but a return which merely stated that the prosecutor had not taken the oaths before a mayor according to the stat. 13 Car. 2, c. 1, was held to be bad for uncertainty, as he might have taken them before two justices: but as to an officer who is bound to take the oaths, it is no excuse that they were not tendered to him.(*p*)

By the subsequent statute, 1 Wm. & M. sess, 1, c. 8, every person having an office was bound to take certain oaths.(*q*) It has, however, been held under such last mentioned statute, that a judgment given against a

(*k*) Bull. N. P. See Mayor of Truro, M. 1816; 2 Chit. 257.† R. v. Coventry (Mayor), 3 Doug. 236. See post, “Rule.”

(*l*) Ante, p. 175. R. v. Ipswich (Bailiffs), 2 Salk. 434. R. v. Dartmouth Mayor, 3 Salk. 229. See tit. “Ashburton” (Eight Men of). See post, tit. “Writ” Form of).

(*m*) R. v. Doncaster, Say. 40; Bac. Abr. tit. “Man.” (I.) These returns apply to those offices only a right to which cannot be tried by quo warranto. See supra, “Election,” and infra, “Restoration” (Return). See tit. “Churchwarden” (Swearing in, Incapax).

(*n*) Cas. t. Hard. 130, n. (1). R. v. Dr. Harris, 1 W. Blac. 430. S. C. Burr. 1420, 1422. R. v. Harwood, Ld. Raym. 1405, overruling R. v. Sympson, M., 11 Geo. 1. R. v. Dr. Ward, 1 Barn. 381, 412; Fitzg. 195. R. v. Twitty, 2 Salk. 433. R. v. York (Mayor), 5 T. R. 66, 72. R. v. Cornwall (Mayor), 11 Mod. 174. R. v. Guise, 3 Salk. 88. S. C. 6 Mod. 189. S. C. Ld. Raym. 1008. R. v. Dover (Mayor), 16 L. J., N. S., 101, M. C. R. v. New Windsor (Mayor), 14 L. J., N. S., 319, Q. B. R. v. Harwich (Mayor), 8 A. & E. 919.† S. C. 8 L. J., N. S. 13, Q. B.; Bac. Abr. tit. “Man.” (G.) See tit. “Churchwarden” (Swearing in, Return, Traverse, Non fuit Electus).

(*o*) R. v. York (Sheriff), 2 Show. 154; Fitzg. 195. See post, tit. “Return.”

(*p*) R. v. Slatford, 5 Mod. 316. S. C. 2 Jones, 121. S. C. 2 Salk. 428. S. C. Comb. 419. S. C. Holt, 438; 1 Hawk. P. C. ch. 8, s. 1. R. v. Sanchar, 2 Show. 66, n. (*a*); Com. Dig. tit. “Franchise” (F. 29). See tit. “College” (Oaths). See post, tit. “Return.”

(*q*) R. v. Exon (Mayor), 1 Show. 258. R. v. London (City), 1 Show. 240.

city, "that the liberties thereof be seized into the King's hands," neither dissolved the corporation, nor amoved the members thereof from their corporate offices; and therefore, if an alderman of the city, after such statute, (which enacts, "that if any person now having any office, shall neglect to take the oaths therein prescribed, before the first of August next ensuing, or sooner if required by the Privy Council, the said office shall be void,") neglected to take the said oaths within the time mentioned, it was a forfeiture of his office, to which he was not restored by the stat. of 2 Wm. & M. st. 1, c. 8, s. 7, (which enacts, "that all officers of the said city who rightly held any office therein at the time the said judgment was given, shall be confirmed in, and have and enjoy the same as fully as they held them at the time the said judgment was given, except such as have been removed for any just cause.")^(r) So, *that if any officer omitted [*188] to take them, and subscribe the declaration at the time of his taking the oath of office, his election to such office became absolutely void, although the oaths or declaration were not tendered to him, therefore, an omission to do so, constituted a good return.^(s)

But now by stat. 5 Geo. 1, c. 6, it is enacted, that all persons required to take such oath or subscribe such declaration, shall be confirmed in their respective offices, and be free from all incapacities and penalties, and none of their acts be questioned, notwithstanding their omission to take such oaths or subscribe the declarations, &c., nor shall they be amoved by the corporation, or otherwise prosecuted for having omitted to take the Sacrament within one year next before their election, unless such removal or prosecution be commenced within six months after the election, and therefore, if neither removal nor prosecution take place within the time limited, the election becomes absolute and unavoidable.^(t)

Subsequent statutes have in some cases mitigated the penalties on omission to take the oaths, and in other cases abolished them altogether.

—.] 5th. *Swearing in*.—The writ lies also to command the swearing in to an office,^(u) if the prosecutor be duly entitled to be sworn in. Thus, if an officer attend a magistrate to be sworn, and he be refused; the writ will be granted, because if the law were otherwise, it would be in the power of the magistrate to elude the act,^(v) and the writ will be granted notwithstanding the officer may execute his office before he is sworn.^(w)

^(r) Smith's case, 4 Mod. 53. S. C. 1 Show. 263, 274. S. C. Carth. 217. S. C. Skin. 293, 310. S. C. Holt, 168, 310. S. C. 12 Mod. 17. See tit. "Oaths."

^(s) R. v. Sanchar, 2 Show. 66. R. v. Morpeth (Bailiff), Stra. 58. See Jones's Rep. 2 Jones, 121. R. v. Thatcher, Trem. 517—523; 4 Mod. 34, n. ^(b), and see stats. 1 W. & M. s. 1, c. 8, s. 6, and 2 W. & M. c. 8, s. 12, supra, p. 187.

^(t) Crawford v. Powell, Burr. 1013. S. C. 1 W. Blac. 229. See also R. v. Monday, Cowp. 539; 25 Car. 2, c. 2; 1 Geo. 1, st. 2, c. 13; 11 Geo. 1, c. 4, s. 4, and 31 Geo. 3, c. 32, s. 18. R. v. Sanchar, 2 Show. 68, n. ^(a), 3rd edit.

^(u) R. v. Maidstone (Corp.), 1 Keb. 733. R. v. Birmingham (Rector), 7 A. & E. 256, and notes ^(a) and ^(b). Also see the several titles throughout the work, and supra, p. 179, n. ^(u). As to before whom a party elected under mandamus must be sworn in, see R. v. Malden, Burr. 1231.

^(v) R. v. Oxon (Mayor), 2 Salk. 429. S. C. Comb. 419.

^(w) See tits. "Churchwarden" (Swearing in). "Mayor" (Swearing in).

But such a mandamus will not be granted to one, who has had judgment on an information in the nature of a quo warranto against him, for an usurpation, unless he claim under a subsequent election or title, for the Court will not assist him who has no right.(x)

—.] *Rule*.—The rule for a writ to swear in, &c., will, in case the right appear plain, be granted absolute in the first instance,(y) and if the officer be municipal, as a corporator, the rule for the writ will be granted as of course.(z)

—.] *Return, non fuit electus*.—To such a writ, a return that the *prosecutor “was not elected” is good,(a) without shewing wherein [*189] the election, if one were had, was rendered void, &c.(b)

If two sue out a mandamus, in a case in which one only can be duly elected, the defendant may return the special matter, for he cannot tell which to swear in.(c)

—.] *Enforcing Duties*.—The writ lies to command an elected officer to discharge all the duties belonging or annexed to the office;(d) notwithstanding he may be liable to a penalty for neglect.(e) So, although such officer be bound by an oath to execute his office duly.(f)

So, the writ lies to command an elected corporate officer to take upon himself the duties of his office, although he may have paid a fine imposed by a by-law, for refusing to accept it, if such fine do not operate as an exemption or discharge from the duties, &c.(g)

So, if persons find themselves injured by the non-residence of a municipal corporator, and the corporation refuse to interfere and to do their duty, such persons may apply to the Court of B. R. for a mandamus, directed to such a corporation, to enforce a performance of their duty,(h) and the applicant is entitled to the writ in such a case *ex debito iustitiæ*.(i)

(x) See *supra*, “Admission.” *R. v. Heale*, *Str.* 625. *S. C. Ld. Raym.* 1447; 3 Bro. P. C. 178. *Vide Cowp.* 509; 2 East, 78; *Com. Dig.* tit. “Man.” (B.).

(y) *Bull. N. P.* 199. See *Mayor of Truro*, *M.* 1816; 2 *Chit.* 257.† *R. v. Coventry (Mayor)*, 3 *Doug.* 236.

(z) 4 *T. R.* 700. The affidavits must shew an election, *Bull. N. P.* 200. *R. v. Harewood*, 2 East, 177; 2 *Mod.* 316. See post, tits. “Application,” “Rule.”

(a) *Cas. t. Hard.* 130, n. (1). *R. v. Dr. Harris*, 1 *W. Blac.* 430. *S. C. Burr.* 1420, 1422. *R. v. Harwood*, *Ld. Raym.* 1405, overruling *R. v. Sympton*, *M.*, 11 *Geo.* 1. *R. v. Dr. Ward*, 1 *Barn.* 381, 412; *Fitzg.* 195. *R. v. Twitty*, 2 *Salk.* 433. *R. v. York (Mayor)*, 5 *T. R.* 66, 72. *R. v. Cornwall (Mayor)*, 11 *Mod.* 174. *R. v. Guise*, 3 *Salk.* 88. *S. C. 6 Mod.* 189. *S. C. Ld. Raym.* 1008. See tit. “Churchwarden” (*Swearing in, Return, Non fuit Electus*); and see post, tit. “Return.”

(b) *R. v. York (Sheriff)*, 2 *Show.* 154; *Fitzg.* 195. See post, tit. “Return.”

(c) *R. v. Guise*, *Ld. Raym.* 1008. *S. C. 6 Mod.* 189; and see 1 *W. Blac.* 430. *S. C. Burr.* 1420. See tit. “Churchwarden” (*Admission*).

(d) *Ante*, p. 12. *R. v. Gravesend (Mayor)*, 2 *B. & C.* 602.† See tits. “Alderman” (*Enforcing Duty*), “Burgess Roll,” “Canal Company,” “Church,” “Corporation Municipal” (*Duties*), “Courts Inferior,” “Lectureship,” “Mayor.”

(e) *R. v. Everet*, *Cas. t. Hard.* 261; *Com. Dig.* tit. “Man.” (A.)

(f) *R. v. Montacute (Ld.)*, 1 *W. Blac.* 62. *S. C. 1 Wils.* 283.

(g) *R. v. Bower*, 2 *D. & R.* 842.† *S. C. 1 B. & C.* 585.† See tit. “By-law.”

(h) 4 *D. & R.* 772.† See tits. “Alderman” (*Restoration, Return, Non-residence*).

(i) *Bull. N. P.* 199; 3 *Blac. Com.* 264, cited in 4 *D. & R.* 772.† See tit. post, “Application.”

The writ will not, however, be granted on a suggestion, that the defendant is attempting an abuse of a public office. Thus, where certain justices had (as it was contended) illegally convicted a dissenting minister of keeping a conventicle, and a mandamus to the justices was moved for to permit him to preach, the Court refused the writ, and said, "that a mandamus is always to command the doing of some act in execution of law, whereas this would be in the nature of a writ, *de non molestando*.(*j*) So, where certain defendants held tobacco, until payment of a certain amount of duty, which the owner contended, was more than was due, and he applied for a mandamus to command them to deliver it up; it was answered, that the commissioners *were not called upon to perform a duty, but to abstain from a wrongful act, and that if they were not entitled to [190] retain the tobacco, they were wrong doers, and liable to a civil action, the Court discharged the rule, saying "either the officers were justified in what they did, or not. If they were, then there was no grievance, but if not so justified, then the writ of mandamus is not the proper remedy."(*k*)

—]. *Deprivation*.—The writ does not lie to command the mayor, &c., to assemble for the purpose of considering the propriety of removing certain members of their body as for non-residence, &c.,(*l*) unless the corporation be misgoverned.(*m*) Nor does it appear, that in any other case the Court can grant a writ to turn out and deprive of an office.(*n*) Thus, it has been held, that an officer in upon a corrupt contract against stat. Edw. 6, or guilty of simony cannot be removed by mandamus.(*o*)

—]. 8th. *Restoration*.—Although most municipal corporations possess a power of amotion over their own members, yet the Court of B. R. has jurisdiction to inquire whether that power has or not been duly exercised; and where it has not, to issue a mandamus to restore, &c.(*p*) At common law, a member of a municipal corporation cannot be amoved until he has been convicted of an offence;(*q*) so that all further power of amotion must be vested in the corporation by their charter, &c.; and if the charter, &c. give a power of amotion for reasonable cause, the Court of

(*j*) See ante, p. 10, n. (*f*), 119, n. (*d*). *R. v. Peach*, 2 Salk. 572. *S. C. nom Peat's case*, 6 Mod. 229. See tit. "Dissenters."

(*k*) Ante, p. 18, 26. *R. v. Customs (Commrs.)*, 5 A. & E. 380.† See tit. "Customs."

(*l*) Ante, p. 4, n. (*b*), 102, n. (*a*). *R. v. Portsmouth (Mayor)*, 3 B. & C. 152.† *S. C. 4 D. & R. 767*;† 2 T. R. 772; and see tits. "Alderman" (Removal), "Capital Burgess" (Removal), supra, "College" (Fellows Expulsion), (Visitor Deprivation), "Councilman" (Removal), and infra, "Return" (Non-residence).

(*m*) Ante, p. 9, 10. See tit. "Councilman" (Removal), and see p. 102, 191, n. (*t*).

(*n*) *R. v. Gower*, 3 Salk. 230, 7. See *R. v. St. John's Coll.*, 4 Mod. 234. *Calvin's case*, 7 Rep. 30; *Vaughan*, 401. *Shuttleworth's case*, 2 Bulst. 122. But see *R. v. Totness (Mayor)*, 5 D. & R. 481.† *R. v. West Looe (Mayor)*, 5 D. & R. 414.† See tits. "College" (Fellows), "University."

(*o*) *R. v. St. John's Cam., Comb.*, 288.

(*p*) Ante, p. 12. *R. v. London (Mayor)*, 4 M. & R. 52. *S. C. 9 B. & C. 1*,† (where see form of pleadings), citing *R. v. Leeds (Mayor)*, *Stra.* 640. *R. v. Axbridge*, 2 Cowp. 523. *R. v. London (Mayor)*, 2 T. R. 177. *R. v. Liverpool (Mayor)*, *Burr.* 731. See supra, p. 179, n. (*u*), and infra, "Return."

(*q*) *Bagg's case*, 11 Rep. 94, cited in *R. v. London (Mayor)*, 4 M. & R. 54. *S. C. 9 B. & C. 1*, 21,† supra.

B. R. will, by mandamus, inquire into the cause; but if it give a power of amotion for such cause as such municipal corporation shall think reasonable, such Court will not interfere. Thus where a charter of incorporation declared, that "it should be lawful for the mayor and capital burgesses to amove any of their body for non-residence within the borough," it was held, that this gave them a discretionary, and not a compulsory power of amotion; and the Court of B. R. refused a mandamus to command them to assemble and consider the propriety of amoving the non-resident members.^(r) And even where a charter [*191] ^{*in terms requires residence, the Court will not command the corporation to meet, for the purpose of considering the propriety of removing non-resident members, if such power of removal be discretionary; because if a meeting be called, and they do not choose to remove the non-resident members, no benefit will be derived from the application, and such a mandamus would afford no remedy for the alleged evil.^(s) But if the affidavits suggest a serious injury or inconvenience to the public by the non-residence, the Court in its discretion may grant the writ.^(t)}

The writ of mandamus will, on a proper application, be granted by the Court of B. R. to restore to, or to precedency in^(u) any office; to which, as before stated, admittance can be obtained through its medium.^(v) The writ of mandamus, when applied to this purpose, is the true specific remedy for a wrongful dispossession of an office or function which has temporal rights attached to it: it is applicable to all cases where the established course of law has not provided a specific legal remedy by another form of proceeding.^(w) Thus it lies if an officer be removed from his office before it is competent to amove him.^(x) But the office or function,^(y) as before stated, must be a freehold, or some other matter of profit.^(z)

As to the office for which a mandamus will lie, see *supra*, p. 179, note (a).

(*r*) Ante, p. 12, 15. *R. v. West Looe*, 5 D. & R. 414; † and see *R. v. Portsmouth*, 4 D. & R. 767.† *S. C.* 3 B. & C. 152.† *R. v. Totness*, 5 D. & R. 481,† and the cases there collected; 4 M. & R. 54.† *S. C.* 9 B. & C. 21,† *supra*; 2 T. R. 351. And see *R. v. Lyme Regis (Mayor)*, 1 Doug. 149, where see form of return of amotion for non-residence. See tit. "Alderman" (Restoration, Non-residence), and *infra*, "Return," "Non-residence."

(*s*) Ante, p. 12—15, 56. *R. v. Totness (Mayor)*, 5 D. & R. 481.† *R. v. Portsmouth (Mayor)*, 4 D. & R. 767.† *R. v. Heaven*, 2 T. R. 772. And see 5 D. & R. 414,† *supra*; Burr. 2089.

(*t*) Ante, p. 38, 56; 4 D. & R. 767,† *supra*. See tit. "Alderman" (Removal); p. 190, n. (*m*). See post, tit. "Application."

(*u*) *R. v. Miles*, 1 Keb. 623. See tits. "Alderman," "Precedence."

(*v*) Ante, p. 11, 12. Bac. Abr. tit. "Man." (C.). *Bagg's case*, 11 Rep. 93, b., which is the leading case as to the restoration to a municipal office. *R. v. New Coll.*, 2 Lev. 15. *R. v. Buckingham (Corp.)*, 10 Mod. 175. *R. v. York (Mayor)*, 2 G. & D. 587. *S. C.* 2 Q. B. 550.† *R. v. York (Sheriffs)*, 3 B. & Ad. 770.† *Hurst's case*, 1 Lev. 75. *Parker's case*, 1 Vent. 331. *R. v. London (Mayor)*, 2 T. R. 180. *Hurst's case*, 1 Keb. 387. *R. v. St. John's Coll.*, 4 Mod. 234. *Calvin's case*, 7 Rep. 20; Vaughan, 401; 2 Bulst. 122.

(*w*) Ante, p. 12, 18—26. *R. v. Blooer*, Burr. 549.

(*x*) Ante, p. 12. *Northampton's case*, Lofft, 549.

(*y*) Ante, p. 12. See ante, tit. "Dissenters."

(*z*) Ante, p. 12, n. (*r*).

(*a*) See *supra*, "Election," n. (*u*).

The Court will not, however, grant a mandamus to one who is removed from his office by a judgment on a quo warranto, for the Court will act upon such judgment until it be reversed, without considering whether it be a proper judgment or not; *(b)* for “*res judicata pro veritate accipitur.*” Nor will the Court grant a mandamus to restore a person where it is confessed that he has been rightly removed, although the act of removal may have been irregularly or informally conducted, as that he was not summoned, &c.; for the Court will not grant this writ to restore, &c., if the prosecutor may the *very instant be properly and lawfully removed. *(c)* Nor [*192] will the Court, in its discretion, grant the writ, although the return be insufficient, if it appear that there has been a gross misbehaviour, sufficient to warrant a removal from the office. *(d)* Nor will it be granted to restore a person, if since his deprivation his right to restoration have ceased, as by lapse of time. Thus, if a mayor be removed, he shall not, after his year has elapsed, have a mandamus to be restored. *(e)* Nor will it be granted for one who has consented to be turned out, *(f)* or who has resigned his office. *(g)*

—.] *Suspension.*—If the applicant for the writ of mandamus be actually in possession of his office, never having been entirely displaced, the writ will be refused, upon the ground that it is not necessary to restore him; for there must be an actual removal in order to authorize the writ. *(h)* So the writ will not be granted to one who is merely suspended from his office quousque, &c., if there be no power to suspend, &c.; for the freehold still remains in him, and he may bring an action on the case

(b) Ante, p. 111, n. *(m)*. R. v. Serle, 8 Mod. 332. S. C. 8 Mod. 234. Com. Dig. tit. “Quo Warranto,” C. 5. See supra, “Swearing in,” and tit. “Court Inferior” (Judgment, Execution, &c.)

(c) Ante, p. 15, 16. R. v. Axbridge, 1 Cowp. 523. R. v. London (Mayor), 2 T. R. 177, 180, (which case was decided after much consideration). Com. Dig. tit. “Man.” (B.) R. v. Griffiths, 5 B. & A. 731.† R. v. Newcastle (Mayor), Burr. 530. R. v. Tidderley, 1 Sid. 14. R. v. Rippon (Mayor), 2 Salk. 433. Bac. Abr. tit. “Man.” (E.) But see R. v. Ward, 1 Barn. 294; and tit. “Bridge House Estates.”

(d) Ante, p. 12—14. R. v. Tidderley, 1 Sid. 14; and see 2 T. R. 180, and 1 Cowp. 523, supra. See R. v. Argent, cited in 2 T. R. 181. And see 2 T. R. 182, n. *(b)*. Bassett v. Chichester, 1 Sid. 286; 7 Mod. 83, n. *(a)*. See tit. “Bridge House Estates.”

(e) Ante, p. 27, 28. Mayor of Durham’s case, 1 Sid. 33. Com. Dig. tit. “Man.” (B.) See ante, tits. “Canal Company,” “Highway” (Tolls), and post, tit. “Application.”

(f) R. v. Lane, Ld. Raym. 1304. But see S. C. Fort. 275, where it is said, that consent to be turned out is not a resignation. See also R. v. Gloucester (Mayor), Holt, 450.

(g) Bull. N. P. 203. R. v. Jay, 3 Keb. 714. R. v. Mills, 1 Keb. 623. Com. Dig. tit. “Man.” (B.) R. v. Rippon (Mayor), 2 Salk. 433; Ld. Raym. 1304. S. C. Fort. 275; Holt, 450.

(h) Ante, p. 15, 16. R. v. Oxford (Mayor), 6 A. & E. 352,† per Williams, J. R. v. Liverpool (Mayor), Burr. 734. R. v. London (Mayor), 2 T. R. 181. R. v. Whitstable Fishery, 7 East, 353. See tits. “Bridge House Estates,” “Councillor” (Suspension).

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for such improper suspension;(*i*) and, it seems, an action for money had and received during his suspension.(*j*)

It has, however, been held, that a suspension, under a power to suspend, &c., *should, if there be one, be shewn in the return, otherwise it will be bad,(*k*) and the applicant will be restored;(*l*) and it should be so set out, in order that the Court may judge whether the suspension be or not for good cause.(*m*) It has also been solemnly decided, that the Court will not grant the writ to restore to an office, though the applicant have been irregularly suspended, if it appear by his own shewing that there was good ground for the suspension, had the proceedings been regular.(*n*)

—.] *Application*.—The Court has always looked much more strictly to the right of a party applying for a mandamus to be restored, than to that of an applicant to be admitted to an office,(*o*) for in the latter case it is required that he shew by affidavit, not only that he has a prima facie title, but also, that he has complied with all the forms necessary to constitute his right; because if he have been before properly admitted, he may incidentally try his right by bringing an action for money had and received for the profits.(*p*) Therefore, in order to entitle himself to this extraordinary remedy, he must lay such facts before the Court as will warrant them in presuming that the right, both legal and equitable, is in him.(*q*) It is not, however, necessary that it should clearly appear that injustice has been done, it is sufficient to raise a reasonable doubt in the Court whether it has or not; especially when it is considered, that if the mandamus be refused, the party has no direct remedy, whereas, if granted, it does not conclude them to whom it is directed, as they may dispute the question on a return to the writ.(*r*)

(*i*) Ante, p. 20. R. v. Guildford (Approved Men, &c.), 1 Keb. 868, 880. S. C. 2 Keb. 1. S. C. Raym. 152. S. C. 1 Lev. 162, per Hyde, C. J., and Kelynge, J., but, Twisden (totis viribus) dissentiente, for, said he, “a suspension is a temporary amotion, and perhaps it will never be discharged.” In the following year, however, a mandamus was granted, on the application of the same person, to restore him to the same office, but it does not appear from the reports (2 Keb. 1; Raym. 152) of the case but that the corporation had actually removed him in the intermediate time. R. v. London (Mayor), 2 T. R. 179, approved in R. v. Griffiths, 5B. & A. 736,† per Best, J. R. v. Tyther, 2 Keb. 250. See R. v. Patrick, 2 Keb. 171, per Keeling, C. J. Com. Dig. tit. “Man.” (B.), and 7 East, 355, n. (*a*) But see Bac. Abr. tit. “Man.” C. 2. See tit. “College” (Fellows Restoration).

(*j*) Ante, p. 20, 24; 2 T. R. 182, per Ashhurst, J. R. v. Whitstable Fishery, 7 East, 353; Bac. Abr. tit. “Man.” C. 3; 17 Ves. 313.

(*k*) 1 Keb. 880, supra. R. v. Tyther, 2 Keb. 250. See post, tit. “Return.”

(*l*) See 2 T. R. 179. Supra, n. (*i*).

(*m*) 1 Keb. 868, 880, and 2 T. R. 179, supra, n. (*i*).

(*n*) R. v. London (Mayor), 2 T. R. 177. Com. Dig. tit. “Man.” (B.), and 7 East, 355, n. (*a*), supra, p. 192, n. (*i*).

(*o*) See supra, “Admission” (Application).

(*p*) Ante, p. 24; 3 T. R. 578, supra; 1 Doug. 134; 1 W. Blac. 25, n. (*o*), 2nd edit; Stra. 557; Ld. Raym. 1334; 8 Mod. 148; 2 T. R. 177; Com. Dig. tit. “Man.” (A.) See post, tit. “Application.”

(*q*) Ante, p. 27, 28; 1 W. Blac. 25, n. (*o*); Cas. t. Hard. 100; 3 T. R. 558, per Buller, J. See post, tit. “Application.”

(*r*) See R. v. Wyndham, Cowp. 378. R. v. Cambridge (U.), 6 T. R. 100.

Although on an application for a writ to be restored to a municipal office, the prosecutor should show some title in himself, yet the Court of B. R. has, in exercise of its superintendency over such corporations, granted a mandamus where no particular person was interested.^(s)

On motion for a mandamus to restore to an office, there is no need of affidavits to show that the applicant was once in, for if he have not been, that fact may be returned;^(t) it is prudent, however, to be fortified with such an affidavit.

—.] *Rule*.—Where the mandamus is to admit or swear in, the Court will, in case the right appear plain, grant the writ upon the first motion. But *where it is to restore one who has been removed, [*194] the practice in all cases is, first to grant a rule to show cause.^(u)

—.] *Writ, Form of*.—The writ for restoration to an office need not allege it to be a place of profit, for all the precedents of such writs are without any suggestion of pecuniary loss; it is a sufficient ground for the writ that there has been a loss of precedence or authority.^(v)

—.] *Returns*.—Returns to a mandamus to restore are of two kinds; 1st. *Traverses*, or those which deny some material fact or facts, being the suggestion and ground of the writ; 2nd. *Special*, or those that confess the amotion, and justify it.^(w)

1. *Traverses*. Among the various returns that may be made by way of traverse to a mandamus to restore, “non fuit amotus” is the most usual, and goes to the foundation of the writ.^(x) So “non fuit admissus” is a good return, for amotion depends upon the admission, and therefore, such a return of “non fuit admissus” is but a special “non fuit amotus.”^(x) So a return of “non appunctuatus” has been held to be good.^(z) So “non fuit electus” is a good return,^(a) and without shewing wherein the

^(s) Ante, p. 11, 32, n. ^(w). R. v. Nottingham (Town), Bull. N. P. 201. See tit. “Corporation Municipal,” and post, tit. “Application.”

^(t) R. v. Cutlers’ Company, Cas. t. Hard. 129. Com. Dig. tit. “Man.” (A.)

^(u) Bull. N. P. 199. See Mayor of Truro, M. 1816, 2 Chit. 257.† R. v. Coventry (Mayor), 3 Doug. 236.† See supra, “Admission” (Rule), “Swearing in” (Rule), post, tit. “Rule.”

^(v) Ante, p. 12, n. ^(r), 191, n. ^(u). Bagg’s case, 11 Co. 93, a. See a precedent, temp. H. 6, cited in Dyer; 6 Ed. 2, Clo. Rolls, membr. 8, in which the words are, de liberis consuetudinibus et a libertate Civitatis. R. v. Oxford (Mayor), Palm. 453; Noy, 92. S. C. Latch. 229. See tits. “Alderman” (Restoration), “Precedence,” and post, tit. “Writ.”

^(w) See post, tit. “Return.”

^(x) R. v. Chester (City), 5 Mod. 11. Com. Dig. tit. “Man.” D. 3. R. v. Buckingham (Corp.), 10 Mod. 174, citing Hereford’s case, 1 Sid. 209, 210. See tit. “Traverse,” 1 Doug. 84. See form of traverses in amotions as to municipal offices. R. v. Shrewsbury (Mayor), Cas. t. Hard. 147. See post, tit. “Return” (Traverse).

^(z) Ruding v. Newel, Stra. 983.

^(a) See tit. “Churchwarden” (Swearing in, Return, Non fuit Electus). Com. Dig. tit. “Man.” D. 3, D. 4. R. v. Stafford (Mayor), 2 Keb. 264; March, 288, pl. 237; Cas. t. Hard. 130, n. (1). R. v. Dr. Harris, 1 W. Blac. 430. S. C. Burr. 1420, 1422. R. v. Harwood, Ld. Raym. 1405, overruling R. v. Simpson, M. 11 Geo. 1. R. v. Dr. Ward, 1 Barn. 381, 412. S. C. Fitzg. 195. R. v. Twitty, 2 Salk. 433. R. v. York (Mayor), 5 T. R. 66, 72. R. v. Cornwall (Mayor), 11 Mod. 174. R. v. Guise, 3 Salk. 88. S. C. 6 Mod. 189. S. C. Ld. Raym. 1008.

election, if any have been had, was rendered void.(b) So a return of "no such office" has been held to be good.(c) So, any other traverse of material matter. Thus, to a mandamus to restore A., who was duly elected, sworn, and admitted, (mentioning no time), a return "that A. was on the 29th August duly elected, but that neither at his election, nor since, nor yet, is he sworn or admitted, and therefore, &c.," is a good return,(d) it being a traverse of a material portion of the writ.

2. *Special Returns*; or those which confess an amotion, and justify it [*195] ^{*}must be specially stated. They must not only accurately state the justification in extenso; but such justification, when so stated, must also be legally sufficient in substance.(e) Thus to a writ to restore, a return that another *praefectus et juratus est*, to the same office, has been held to be bad, as containing no legal avoidance or justification.(f)

Such a *special* return should shew: 1st. The cause or causes of removal. 2ndly. The power of removal. 3rdly. A summons, when necessary, or its equivalent. 4thly. That the causes of removal are true. 5thly, and lastly, That the removal was founded upon the alleged causes of removal. In other words, the return should shew that the prosecutor was removed in a legal manner, and for a legal cause.(g)

— 1st. *The Cause or Causes of Removal*.—The general grounds of disfranchisement, and, therefore, of return, in cases of municipal offices, are of three kinds: 1. Such offences as are against the oath and duty of the officer, and to the prejudice of the municipal corporation, which being breaches of official trust and condition, need not a previous conviction; but such corporation may, in the first instance proceed to disfranchise, there being an inherent power in every such corporation so to do. Thus an offence is no cause of disfranchisement, unless it be of a thing done which works to the destruction of the body corporate, or of the liberties or privileges thereof; so that no personal offence, offered by one member to another, as, for instance, an assault, is good ground of disfranchisement;(h) nor is a mere breach of contract or covenant a good return. Thus, a return that the prosecutor, contrary to his indenture, had married within two years, has been held to be bad.(i)

(b) *R. v. York (Sheriff)*, 2 Show. 154; *R. v. Ward (Dr.)*, Fitzg. 195. See post, tit. "Return" (Traverse).

(c) *Supra*. *R. v. Dartmouth (Mayor)*, 3 Salk. 229. See tits. "Ashburton" (Eight Men of), "Curate," p. 113, n. (g).

(d) *R. v. Lynn (Mayor)*, Andr. 105. Com. Dig. tit. "Man." D. 3.

(e) *R. v. Dover (Mayor)*, 16 L. J., N. S. 101, M. C. These returns require great skill in the preparation, and should, therefore, be settled by counsel. See post, tit. "Return," (Certainty).

(f) *R. v. Cornwall (Corp.)*, 11 Mod. 174, citing Doug. 79, 80. Com. Dig. tit. "Man." D. 3, D. 4.

(g) Bac. Abr. tit. "Man." (J.); Burr. 731. See post, tit. "Return."

(h) Ante, p. 39, n. (k); Bull. N. P. 203, 204; Carth. 173. See tits. "Freedom" (Company, Admission), "Alderman" (Restoration, Return), and infra, n. (j).

(i) Ante, p. 125, n. (t). *R. v. Townsend*, 1 Keb. 458, 470, 659. S. C. 1 Lev. 91.

2. Such misbehaviours as are general offences, and which render infamous, as perjury, forgery, &c., although they have not any immediate relation to the office; for in such cases it is the loss of *credit*, or in other words, the *infamy*, which is the ground of forfeiture, and therefore conviction, which is the ground of the infamy, must precede the disfranchisement;(*j*) so that if the crime upon which the conviction is founded, be such as does not carry infamy with it, it will be no cause of disfranchisement, as if one be convicted of *a simple assault.(*k*) But when a conviction disables a man from holding an office, a return of the [*196] offence, without stating the conviction, is good.(*l*)

3rd. Such misfeasances as partake of both those previously mentioned, namely, by being a breach of oath and duty, and an offence at common law; these are clearly causes of disfranchisement, without a previous conviction; as to this point, however, there was formerly a great diversity of opinion, and what is said in Bagg's case, "that if a party be convict of an offence against his duty, and to the prejudice of the corporation, it is good cause to remove him," would seem to imply that a previous conviction is necessary, but it is not so, for if the whole paragraph be considered, it will appear that it is only referrible to those cases where there is no power of amotion.(*m*)

Having thus stated a general outline of those offences, a commission of which create a forfeiture of a municipal office, it merely now remains to treat specifically of the principal of those offences.

— *Bribery*.—A return that the prosecutor corruptly bribed one of the burgesses to vote for a Member of Parliament, and a power of amotion for such cause is good, if there have been a precedent conviction.(*n*) But in another case, on a return that the prosecutor corruptly gave money to one of the corporation to vote for a mayor, the Court was equally divided; two of the Judges holding that a precedent conviction was necessary; the other two that it was not: but it was then stated by the Court, "that for such offences as are such at common law merely, a precedent conviction is necessary; because, in such case, the removal is on the ground of infamy; but that for an action prejudicial to the corporation,

S. C. 1 Sid. 107. S. C. Raym. 69. See also R. v. York Railway, 14 L. J., N. S. 277, Q. B. See tit. "Citizen" (Restoration).

(*j*) Bagg's case, 11 Rep. 98, 99. S. C. 1 Roll. 224, which is the leading case on this subject; 8 Mod. 101. R. v. Derby (Mayor), Cas. t. Hard. 154; Bull. N. P. 206. Lane's case, Ld. Raym. 1304. S. C. Fort. 200, 275. S. C. 11 Mod. 270, but differently reported. R. v. Richardson, Burr. 538; 8 Mod. 100; Fort. 206. R. v. Liverpool, Burr. 732. See tits. "Alderman" (Restoration, Return), "Conviction," and post, p. 196, n. (*o*).

(*k*) Bull. N. P. 206, supra, p. 195, n. (*h*).

(*l*) Anon., 2 Show. 183.

(*m*) See infra, n. (*o*). Cas. t. Hard. 154. Haddock's case, Ray. 435. See return of *Bribery*, infra, n. (*n*). R. v. Hutchinson, 8 Mod. 101, citing Yate's case, Sty. 477. R. v. Ipswich (Bailiffs), 2 Salk. 434. But see Bull. N. P. 206. See tit. "Alderman" (Restoration, Return).

(*n*) R. v. Newcastle (Mayor), commonly called Parrott's case, M. 8 Anne, cited in R. v. Derby (Mayor), Cas. t. Hard. 154.

as well as contrary to the common law, the party may be disfranchised, without a prior conviction.”(o)

—.] *Desertion ; Non-residence, &c.*—Public offices having been instituted for the public good, are determined by nonuser or desertion.(p) Thus if a member of a municipal corporation, as an alderman, Burgess, &c., desert or cease to reside within the limits of his corporation, such desertion, &c. is a good cause of amotion, and therefore of return;(q) [*197] *deseruit et reliquit* is *sufficient, for they signify a total desertion;(r) the return must allege a total desertion, or it will be insufficient in substance.(s)

But non-residence, though a good cause of removal, does not ipso facto determine the office, for there must be judgment of amotion by the corporation, before an information in the nature of a quo warranto will lie,(t) so in general the Court of B. R. will not grant a mandamus to elect another upon non-residence, unless the non-resident party have been previously removed.(u) It has also been held, that if a non-resident officer attend his office, though he live out of the corporation, yet his attendance upon the office will be a sufficient residence.(v)

Where the non-residence is a good ground of amotion, it is not necessary to summon to come in and reside previously to the proceedings to amove.(w)

—.] *Drunkenness.*—Habitual drunkenness is a good return to a mandamus to restore, but contra, if the prosecutor were drunk by accident.(x)

—.] *Erasing Corporation Books.*—Erasing or making false entries

(o) Ante, p. 196, n. (h), (j). R. v. Carlisle (Alderman), 8 Mod. 19, 99. S. C. 11 Mod. 378. S. C. Stra. 385. S. C. Fort. 200, cited in Derby (Mayor), Cas. t. Hard. 155. Bagg's case, 11 Rep. 99. Com. Dig. tit. “Man.” D. 3. R. v. Tiverton (Mayor), 8 Mod. 186.

(p) R. v. Campion, 1 Sid. 14. Exeter (City) v. Glide, 4 Mod. 36. Stanton's case, Moor, 135. See tit. “Alderman.”

(q) R. v. Truebody, 11 Mod. 75. S. C. Ld. Raym. 1275. S. C. Holt, 449. R. v. Lyme Regis (Mayor), 1 Doug. 149, 569. Exeter (City) v. Glide, 4 Mod. 36; Bull. N. P. 206; 1 Show. 258, 364. R. v. Leicester (Mayor), Burr. 2087. R. v. Newcastle (Mayor), Burr. 530; Say. 39. See form of return of non-residence, &c., 1 Doug. 135. See tit. “Alderman” (Restoration, Return, Non-residence).

(r) Ante, p. 40. R. v. Exeter (Mayor), 1 Show. 364, 365, per Holt, C. J., and Eyre, J. S. C. 4 Mod. 36. S. C. Holt, 169, 435. See tit. “Alderman.”

(s) Ante, p. 59, n. (h); Burr. 2087, supra; Smith's case, 4 Mod. 56; Bull. N. P. 207. R. v. Leicester (Corp.), Burr. 2087.

(t) R. v. Heaven, 2 T. R. 772; 1 Show. 365, n. (a), 3rd edit. R. v. Ponsonby, Ves. 6. S. C. 5 Bro. P. C. 287. S. C. Say. 245; Bull. N. P. 211. Exeter (City) v. Glide, 4 Mod. 36.

(u) R. v. Truro (Mayor), 3 B. & A. 590; † S. C. 2 Chit. 257. † See supra, “Election.”

(v) 11 Mod. 75, supra. R. v. Exon (Mayor), 1 Show. 260, 3rd edit., n. (b). R. v. Leicester (Mayor), Burr. 2087. See return of non-attendance, 1 Doug. 177.

(w) Ante, p. 40, (Summons); 1 Doug. 149—160. See infra, tit. “Summons.” R. v. Exon (Mayor), 1 Show. 259, 3rd edit., n. (b).

(x) R. v. Taylor, 3 Salk. 231. See tits. “Alderman” (Restoration, Return) “Parish Clerk” (Restoration, Return).

in corporation books, is not only an offence at common law, but also against the official duty, and therefore good cause of disfranchisement; (*y*) the erasure should, however, be alleged to be detrimental to the corporation. (*z*)

—.] *Incapacity*.—Also to such a writ, a return of any incapacity, is good, if the defendant be the judge of it; (*a*) a confession of an amotion and a justification of it on such a ground is a very common species of return. (*b*)

—.] *Incompatible Office*.—If a prosecutor have taken a second office, which is incompatible with, and avoids his tenure of a prior one; such fact, if properly stated, will be a good return. (*c*)

—.] *Slander*.—A return of an amotion, because the prosecutor has *spoken opprobrious or slanderous words of an officer of the same corporation, is not good, unless spoken concerning the official duties of such officer; (*d*) but if so spoken, the prosecutor may be, therefor, disfranchised, without a previous conviction. (*e*)

—.] *Neglect of Official Duties*.—If an officer act contrary to the nature and duty of his office; or if he refuse to act at all, the office may therefor become forfeited; so that all commissions or omissions, within the spirit of such rule, will form a good matter of return in confession and avoidance, to a writ of mandamus to restore, &c. (*f*) Thus a general neglect or refusal to attend to the duties of an office, is a ground of forfeiture; so determined neglect or wilful refusal; but a single instance of omitting to attend, when no particular business was expected, does not work a forfeiture. (*g*) Thus occasional non-attendance at the Court of Quarter Sessions, is no cause of forfeiture of a municipal office; for though there be a difference between public offices that concern the administra-

(*y*) Bull. N. P. 204; ante, p. 40. R. v. Wilton (Mayor), M. 8 Wm. 3; Ld. Raym. 225. S. C. 5 Mod. 257. S. C. 2 Salk. 428. S. C. nom. R. v. Chalk, Comb. 396, 397. R. v. Derby (Mayor), Cas. t. Hard. 153, per Hardwicke, C. J. Yates's case, Sty. 480. R. v. Perrott, M. T., 8 Anne. But see R. v. Hutchinson, 8 Mod. 100, citing Fort. 200. See tit. "Alderman" (Restoration, Return, Erasing Corp. Books).

(*z*) R. v. Chalk, Ld. Raym. 226.

(*a*) Ante, p. 72. R. v. Cambridge (U.), 8 Mod. 148; 10 Mod. 174. See tits. "Churchwarden" (Swearing in, Return, Incapax), "Lectureship."

(*b*) Ante, p. 194. R. v. Guildford (Approved Men), 1 Lev. 162. S. C. 1 Keb. 868, 880. S. C. Raym. 152; 10 Mod. 174.

(*c*) R. v. Sandwich (Corp.), 2 Keb. 92. Awdley's case, Latch. 123. R. v. Pate-man, 2 T. R. 777. See tit. "Town Clerk" (Restoration, Return).

(*d*) R. v. Gloucester (Mayor), Holt, 450. Jay's case, 1 Vent. 302. S. C. 3 Keb. 714. Clark's case, 1 Vent. 327. S. C. Cro. Jac. 506. Parker's case, 1 Vent. 331. Bagg's case, 11 Rep. 98. S. C. 1 Roll. 79; 11 Mod. 379. R. v. Raines, 3 Salk. 234. Earle's case, Carth. 173, where see form of return. See R. v. Cambridge (Chancellor), Stra. 557. See tits. "Alderman" (Restoration, Return), "Councillor" (Restoration, Return).

Lord Hale usually required such a return to be sworn. See tit. "Councillor" (Restoration, Return), and post, tit. "Return."

(*e*) Ante, p. 195, per Fortescue, J., 11 Mod. 379. But see R. v. Lane, Fort. 275.

(*f*) Ante, p. 194. See Bac. Abr. tit. "Office" (M.) See infra, n. (*g*), (*h*), as to return, and see post, tit. "Return."

(*g*) Burr. 2004; 2 Salk. 434. S. C. Ld. Raym. 1233. See tit. "Recorder" (Restoration, Return).

tion of justice, and private offices, in this, that nonuser in the one, is no forfeiture without a request, and some special loss occasioned thereby, as it is in the other; yet as the absence of a single officer, as an alderman, does not hinder the holding of Courts, or the valadity of the acts of that Court, such an absence does not amount to a neglect or nonuser of such office.(h)

—.] *Oaths*.—As to a return of omission to take oaths, see *supra*, titles *Aldermen (Restoration ; Return)*; *Admission (Return ; Oaths)*.

—.] *Statement in Return of Causes of Removal*.—Where an amotion is returned, the return must contain all the facts necessary to shew that the prosecutor was removed in a legal and proper manner, and for a legal cause. It is not sufficient to state conclusions only, the facts themselves, upon which the amotion was founded, must be precisely alleged, in order that the Court may be the judge of the matter;(i) so that a general allegation of neglect *and omission of duty, has [*199] been held to render such a return insufficient,(j) and to warrant a peremptory mandamus.(k) So a return which alleged the articles or causes of removal, “ad effectum sequentem,” has been held to be ill.(l) This principle does not, it seems, apply to an amotion from the office of common councilman;(m) nor to any office which is either at pleasure or discretionary.(n)

The cause of removal must shew a neglect of duty, &c., in the *particular office* from which the prosecutor has been removed.(o) So that a return that the prosecutor had misbehaved as chamberlain, and therefore

(k) Bull. N. P. 202, 203. R. v. Bristol (Mayor), 1 Show. 288. R. v. Pomfret (Mayor), 10 Mod. 108; Reynell's case, 9 Rep. 99. Serjt. Whitaker's case, 2 Salk. 434. S. C. Ld. Raym. 1233. R. v. Carlisle, Stra. 385. R. v. Leicester (Mayor), Burr. 2087. R. v. Wells, Burr. 1999. R. v. Richardson, Burr. 517. R. v. Exon (Mayor), 1 Show. 260, 3rd edit., n. (b). R. v. Wells (Corp.), Burr. 1999. Shrewsbury's case, 9 Rep. 46 b.

(i) Bull. N. P. 203. Bac. Abr. tit. “Man.” (I). See post, tit. “Return.” R. v. Buckingham (Corp.), 10 Mod. 174, 175. R. v. Liverpool (Mayor), Burr. 731, per Mansfield, C. J. R. v. Doncaster (Mayor), Say. 37; and see S. C. Ld. Raym. 1566. R. v. London (Mayor), 3 B. & Ad. 261.† R. v. Abingdon (Mayor), 2 Salk. 432. R. v. Lyme Regis (Mayor), 1 Doug. 149. Bagg's case, 11 Rep. 98. R. v. Exon (Mayor), 1 Show. 259, 3rd edit. Freeman's case, Cro. Car. 579. R. v. Corye, Sty. 87. R. v. Wilton (Mayor), 2 Salk. 438. S. C. Ld. Raym. 225. S. C. 5 Mod. 255, 257.

(j) R. v. Doncaster (Mayor), Ld. Raym. 1566. S. C. Say. 37; Doug. 144. Warren's case, Cro. Jac. 540. R. v. Deighton, 2 Keb. 656. Bac. Abr. tit. “Man.” (I).

(k) R. v. Shaw, 12 Mod. 113. R. v. Apleford, 2 Keb. 861, and cases there cited.

(l) R. v. Hutchinson, 8 Mod. 102; but see S. C. Fort. 200. R. v. Bear, 2 Salk. 417. Pullen v. Palmer, Ld. Raym. 496. See post, tit. “Return.”

(m) Dighton's case, 1 Vent. 82. S. C. 2 Keb. 656. Warren's case, Cro. Jac. 540. See tit. “Councilman.”

(n) See ante, p. 12—15. R. v. Eye (Bailiffs), 4 B. & A. 271.† S. C. 1 B. & C. 85. S. C. 2 D. & R. 172.†

(o) Ante. Bull. N. P. 203. Lord Hawley's case, 1 Vent. 145. Anon., Sty. 151. Bagg's case, 11 Rep. 93 b. R. v. Chalke, Ld. Raym. 255. S. C. 2 Salk. 428. R. v. Hutchinson, 8 Mod. 99. R. v. Newbury (Mayor), 1 Q. B. 751.† S. C. 1 G. & D. 388.

they had removed him from his office of capital burgess, has been held to be bad.(p)

— 2nd. *The Power of Removal, &c.*—The power to remove or suspend, must be shewn upon the face of the return,(q) in order that the Court may see both that such a power exists, and that it has not been exceeded; for if the power to remove be only for “reasonable cause,” the Court will inquire into the cause.(r)

In a return to a mandamus to restore, if it be stated that the prosecutor was removed by the municipal body at large for a corporate offence, it is unnecessary to aver that a power of removal for such offence is vested in them; because such a power is inherent in their constitution, and therefore the law will take notice of it without averment, according to the rule “*Expressio eorum quæ tacitè insunt nihil operatur.*” Sometimes, however, such power is expressly given by charter, by-law, &c. to a select part; if vested in a select part,(s) the return should shew how, whether by charter or *prescription, &c. If the prosecutor mean to contend that it is vested in a select part, he may either allege it in reply [*200] to the return, or bring an action for a false return.(t)

The return should shew that the power of removal has been duly exercised;(u) thus, as a corporation cannot remove by an order, but only by an act under the *Common Seal*, so such an act must be shewn in the return.(v) But where an election is merely entered in a book, a bare order of discharge is sufficient.(w) So, where a return stated the motion to have been made per Majorem et Burgenses generally, the Court presumed it to have been executed by all, and not by the mayor and major part of the burgesses, for “*indefinitum æquipollet universali*,” and stated if all the burgesses were not there, an action for a false return would have lain.(x) But where a return alleged that the mayor, &c. had met in the

(p) *R. v. Doncaster (Mayor)*, *Ld. Raym.* 1564. *S. C.* 1 *Barn.* 264. *Com. Dig.* tit. “*Man.*” D. 4.

(q) *R. v. London (Mayor)*, 2 *T. R.* 179. *Bruce’s case*, *Str.* 819. *R. v. Guildford*, 1 *Lev.* 162. *S. C.* 1 *Keb.* 868, 880. *S. C.* *Ray.* 152. *Com. Dig.* tit. “*Man.*” D. 4.

(r) *Ante*, p. 198, n. (i). *R. v. London (Mayor)*, 3 *B. & Ad.* 267.† *R. v. Stratford-upon-Avon (Mayor)*, 1 *Lev.* 291; *Ld. Raym.* 710. *R. v. London (Ep.)*, 13 *East*, 419, and n. (a). *R. v. Thame (Churchwardens)*, *Str.* 115. *R. v. Cambridge (U)*, 8 *Mod.* 161, per *Pratt, C. J.*, citing 5 *Rep.* 57.

(s) *R. v. Lyme Regis (Mayor)*, 1 *Doug.* 149, where see form of return. *R. v. Richardson*, *Burr.* 517. *Haddock’s case*, *Raym.* 439. *Lord Bruce’s case*, *Str.* 819. *Symmers v. Regem*, *Cowp.* 502. *R. v. Lyme Regis (Mayor)*, 1 *Doug.* 149. *Exeter (City) v. Glide*, 4 *Mod.* 34, n. (a). *R. v. Doncaster (Mayor)*, *Say.* 38. *R. v. Liverpool (Mayor)*, *Burr.* 732. *Bac. Abr.* tit. “*Man.*” (I.)

(t) 1 *Doug.* 149, (144), *supra*. *R. v. Doncaster (Mayor)*, *Say.* 38. *S. C. Bull. N. P.* 201, 205. *S. C. Ld. Raym.* 1564. *Com. Dig.* tit. “*Man.*” D. 3. *R. v. Feversham*, 8 *T. R.* 536. *Bac. Ab.* tit. “*Man.*” (I.)

A power of motion ad libitum not being incident to a corporation, must, when relied upon, be positively alleged; 2 *Salk.* 430, n. (a).

(u) *R. v. Doncaster (Mayor)*, *Say.* 38. *Com. Dig.* tit. “*Man.*” D. 3.

(v) *Bull. N. P.* 201. *R. v. Wilton (Mayor)*, 5 *Mod.* 259. *S. C.* 2 *Salk.* 428. *R. v. Holt*, 3 *Keb.* 700, cases there cited.

(w) *R. v. Chalke*, *Ld. Raym.* 226.

(x) *R. v. Brayfield*, 2 *Keb.* 489, and *Colchester’s case* there cited; 1 *Bulst.* 160; *March.* 165. And see *Dighton v. Stafford (Corp.)*, 2 *Keb.* 641.

council house, but it was not said to be at a common council there held. such return was quashed.(y)

The return should also shew, that the body removing had not only the power to remove, but were legally constituted for the occasion. So that it is not sufficient to say that the common council in due manner met and assembled, it must expressly allege that they were all summoned;(z) for the omission to summon one member, resident within the limits of the borough, to a corporate meeting, avoids the acts of that meeting.(a) But a return which stated that the body was duly assembled to amove, &c., has been held to be sufficient.(b)

The notice to the corporators to meet, should contain a statement of the particular business for which their presence is required.(c)

— 3rd. *Summons; when Necessary.*—After a person has been admitted to an office, he cannot be justly amoved from it in invito without having previously forfeited it, and an inquiry had, as to whether there has been a forfeiture or not; which inquiry can only be made after the party [*201] amoved has been personally summoned to answer the matters wherewith he is charged.(d)

A summons, therefore, is in general necessary in all cases where the amotion is in invito. But where the prosecutor is amoved for non-residence, or he reside out of the borough, &c., the corporation is not bound to go out of its jurisdiction to summon him.(e) It must, however, clearly

(y) R. v. Gloucester (Mayor), 3 Bulst. 126. See post, tit. "Return" (Certainty).

(z) Bull. N. P. 204. R. v. Liverpool (Mayor), Burr. 232, 723. Com Dig. tit. "Man." D. 4. How a removal was effected need not be alleged on a removal from an office durante bene placito. R. v. Holt, 3 Keb. 700. R. v. Cambridge (Mayor), 2 Show. 70. Ante, p. 176.

(a) R. v. Shrewsbury (Mayor), Cas. t. Hard. 147. S. C. Stra. 1051. S. C. Andr. 171. S. C. Ridgw. 46. S. C. 14 Vin. Abr. 583, c. 4; Bull. N. P. 208. R. v. Grimes, Burr. 2598. Bagg's case, 11 Rep. 90. R. v. Gaskin, 8 T. R. 209. R. v. Truebody, Ld. Raym. 1275. R. v. Chalke, Ld. Raym. 226. R. v. Darlington School, 6 Q. B. 707.†

(b) R. v. Doncaster (Mayor), 2 Ld. Ken. 391; Burr. 738.

(c) R. v. Doncaster (Mayor), Burr. 738; R. v. Carlisle (Corp.), Stra. 384; 11 East, 84, n. (a), nom. Machell v. Nevinson, E. 10 Geo. 1.

(d) Supra, p. 195; Bull. N. P. 204; Bac. Abr. tit. "Man." (I.) R. v. London (Mayor), Holt, 169, 170. R. v. Gaskin, 8 T. R. 209. R. v. Davies, 9 D. & R. 209.† R. v. Smith, 5 Q. B. 619.† S. C. 1 D. & M. 565, where see plea of "no summons." S. C. 13 L. J., N. S. 166, Q. B. R. v. Oxford (Mayor), Latch. 229. S. C. Palm. 455. Bagg's case, 11 Rep. 93 b. Painter v. Liverpool Gas Company, 3 A. & E. 433.† R. v. Langley, 5 Q. B. 619,† n. (y). R. v. Neale, 4 N. & M. 868;† 5 Q. B. 622.† n. (c). R. v. St. James' (Vicar), 5 Q. B. 622.† R. v. Darlington School, 6 Q. B. 709.† R. v. Griffiths, 5 B. & A. 731.† The Protector v. Colchester (City), Sty. 447, 453. R. v. Cambridge (U.), Stra. 566, per Fortescue, J. S. C. Fort. 204. R. v. Aldborough, 10 Mod. 101; 10 Mod. 180, n. (f). Dunch v. Norwich (City), 2 Salk. 436. R. v. Bentley, Stra. 912. R. v. Litchfield (Ep.), 7 Mod. 217; 1 Bing. 357.† Dr. Sherlock v. Norwich (Dean), Fort. 222. See further, as to summons, tit. "Alderman" (Summons).

(e) R. v. Exeter (Mayor), 1 Show. 365, 366. S. C. Comb. 198. S. C. 4 Mod. 33. S. C. Holt, 169, 435. S. C. 12 Mod. 27; and see supra, Cowp. 503; 1 Doug. 149. R. v. Shrewsbury (Mayor), 7 Mod. 202. R. v. Truebody, 11 Mod. 75. S. C. Ld. Raym. 1275. S. C. Holt, 449. R. v. Grimes, Burr. 2598. See 1 Kyd. on Corp. 443. Bagg's case, 11 Co. 99. R. v. Lyme Regis (Mayor), 1 Doug. 149. See tit. "Alderman" (Return, Summons). A corporate office does not become ipso facto vacant

appear that the non-residence is with the intention of withdrawing permanently, or the Court will grant a peremptory mandamus.(f)

But where a good and true cause of suspension or removal is returned, the Court will not, although the prosecutor have not been summoned, restore him to his office. Thus, where a corporator declared that he would serve no longer, and was thereupon removed, the Court refused to restore him, though he had not been summoned.(g) So after a voluntary resignation.(h) So, where a mandamus was applied for to restore a town clerk, upon the ground that he had been removed without notice to appear and defend himself, the Court refused the writ, because it was admitted there was sufficient cause for the amotion.(i)

——. *For what offices.*—Those offices only which are of a freehold nature, whatsoever the ground of amotion may be, require a previous summons, &c.(j) For to a mandamus to restore an officer who is in at *pleasure only, it is, as before stated, a good return to say, it was [*202] their pleasure to remove him, and in such a case a summons is not necessary;(k) but if by the return it should appear that such officer was amoved for some misfeasance, and the power to remove ad libitum be not returned nor relied upon, then the return must allege a summons, &c. as in other cases.(l) So, no summons previously to removal is necessary, where there is a discretionary power of amotion.(m)

——. *Form of summons.*—The cases differ considerably as to whether the summons may be merely general in its terms, or that it is necessary that it should particularly specify the matters to be charged. Thus, the Court has on many occasions stated, that there need not be any summons to answer particular matters;(n) on other occasions the Court has said, that the prosecutor should have had a particular summons for a particular charge, and that it is not sufficient to summon generally, and then to allege particular crimes, &c. against him, which he may not be prepared

by non-residence,—it is a forfeiture; but the franchise is not lost till a sentence of amotion has been pronounced; see ante, p. 197. R. v. Exon (Mayor), 1 Show. 260, 3rd edit., n. (h), citing R. v. Heaven, 2 T. R. 772. 1 Show. 365, citing Moore, 135, 833.

(f) Ante, p. 197. R. v. Truebody, Ld. Raym. 1275. R. v. Leicester (Mayor), Burr. 2089. R. v. Lyme Regis (Mayor), 1 Doug. 149. See Espinasse's Dig., 2nd edit., p. 679. See tit. "Alderman" (Restoration, Return, Non-residence).

(g) Ante, p. 192. R. v. Axbridge, Cowp. 523. R. v. London (Mayor), 2 T. R. 177. R. v. Dr. Gaskin, 8 T. R. 209. R. v. Tiddlerley, 1 Sid. 14. Hazard's case, 2 Roll. 11.

(h) Ante, p. 192. R. v. Rippon (Mayor), 2 Salk. 433. S. C. Ld. Raym. 563.

(i) Ante, p. 192. R. v. Exon (Mayor), 1 Show. 259, 3rd edit., n. (e), citing 260, n. (j) R. v. Axbridge (Mayor), Cowp. 523.

(j) Recorder of Colchester's case, 2 Keb. 656; and see Sid. 461. R. v. Dighton, supra, p. 176, n. (t).

(k) Ante, p. 176. R. v. Thame (Guardians), Stra. 115. R. v. Holt, 3 Keb. 700. Com. Dig. tit. "Man." (D. 3). Dighton v. Stratford-upon-Avon, 2 Keb. 641.

(l) Ante, p. 176. Stra. 115, supra. R. v. Ipswich (Bailiffs), 2 Salk. 435, 16. S. C. Ld. Raym. 1233.

(m) Ante, p. 12—15. R. v. Darlington School, 6 Q. B. 682.†

(n) R. v. Wilton (Mayor), 5 Mod. 259. S. C. 2 Salk. 428. S. C. Ld. Raym. 225. Com. Dig. tit. "Man." D. 3.

to answer.(o) It would seem, that the summons should specially allege the grounds of the amotion. No public notice is necessary.(p)

— *Allegation of Summons in Return.*—As the fact of summons is necessary to a legal amotion, so a specific allegation of summons, or of equivalent facts, in a return of such an amotion, is so requisite to its validity that its absence is an objection that can never be got over.(q) Therefore, in all cases in which a mandamus is brought to command a restoration to an office, the return must not only shew the cause of removal, but that the party removed was summoned to answer, or was heard in his defence. Thus, although a municipal corporation have lawful authority, either by charter or prescription, to remove, and may have had just cause to remove the prosecutor, yet, if it appear from the return that they proceeded against him without having either summoned or heard him in answer to what was objected against him, such removal will be void, and will not bind the prosecutor, because it is against justice and right.(r) So, where a return *did not show upon the face of it [*203] that the prosecutor had been, previously to amotion, summoned or heard as to the matters objected against him, it was quashed.(s) It is not however necessary, that the prosecutor should, in pursuance of the summons, have appeared to answer the charge.(t)

An allegation of non-attendance, licèt summonitus, has been held good by three judges, contra Holt, C. J., who held a particular summons to be necessary.(u) So, an objection taken to a return to a mandamus to restore to the office of alderman, that it was not stated that the alderman had notice to defend himself, but that he had been summoned to attend in his place as alderman, was overruled; it being held, that such an allegation was equivalent to a formal notice.(v) So, if the return say “quod pro-

(o) *Exeter (City) v. Glide*, 4 Mod. 37, n. (a). *Bagg's case*, 11 Rep. 99. *R. v. Liverpool (Mayor)*, Burr. 731. *Morris's case*, M. 7 Wm. 3, cited in Mod. 37. *R. v. Exon (Mayor)*, 1 Show. 259. *R. v. Chalke, Ld. Raym.* 225. *S. C.* 2 Salk. 428. *S. C.* 5 Mod. 254, 257. *R. v. Exeter (Mayor)*, 1 Show. 365, 3rd edit., per Holt, C. J. *R. v. Cambridge (Chancellor)*, Stra. 557. See infra, n. (u).

(p) *R. v. Shrewsbury (Mayor)*, 7 Mod. 202, citing Serjeant Glide's case, 4 Mod. 33. *S. C.* 1 Show. 258, 364. *S. C. Comb.* 197. *S. C. Holt*, 169, 435. *S. C.* 12 Mod. 27, 251. *S. C. Ld. Raym.* 223.

(q) *R. v. Cambridge (U.)*, 8 Mod. 164, citing *Dr. Bentley's case*, 2 Barn. 19, 22. *R. v. Shrewsbury (Mayor)*, 7 Mod. 202. *R. v. Wilton (Mayor)*, 2 Salk. 434. *S. C. Ld. Raym.* 225. *S. C.* 5 Mod. 255, 257.

(r) *Bragg's case*, 11 Co. 99 b., cited in *R. v. Smith*, 1 D. & M. 573. *S. C.* 5 Q. B. 614.† See p. 200, and tits. “Alderman” (Restoration Summons).

(s) 9 Edw. 4, 14. *Campion's case*, 2 Sid. 97. *Bagg's case*, 11 Rep. 99 a. *Anon.*, Sty. 151, 447. *The Protector v. Colchester (Town)*, Sty. 452. *R. v. Brayfield*, 2 Keb. 488. *R. v. Dr. Gaskin*, 8 T. R. 209. *R. v. Aldborough (Borough)*, 10 Mod. 101. *R. v. Cooper*, 1 Keb. 777. *R. v. Heaven*, 2 T. R. 772. *Dr. Bentley's case*, Fort. 202, 206, 235. *S. C. Stra.* 557; *Ld. Raym.* 1334; *Com. Dig.* tit. “Man.” D. 3, D. 4. *R. v. Cambridge (U.)*, 8 Mod. 154. *Exeter (City) v. Glide*, 4 Mod. 37.

(t) *Com. Dig.* tit. “Man.” D. 3.

(u) *R. v. Glyde*, 12 Mod. 28. *S. C.* 1 Show. 364. *S. C. Holt*, 169, 435. *S. C. Ld. Raym.* 223; 1 Doug. 149; *Cowp.* 503; supra, p. 199, n. (z). See ante, p. 202, n. (n), (o), (t).

(v) *R. v. Gaskin*, 8 T. R. 210, citing 11 Co. 99 a. *R. v. London (Mayor)*, M., 26

curaverunt cum summoneri," it is sufficient.(w) But an allegation of licet sapius requisitus, &c., has been held not to be sufficient to express a summoning.(x)

If it be alleged "that the prosecutor appeared and was heard," it is sufficient; for appearance cures a want of summons, and in such case a summons need not be alleged, for the Court will presume he was heard in his defence.(z) So, an allegation of "quod fuit auditus de materiis objectis" has been held to be sufficient, although it did not state that he was summoned; for the intent of the summons is, that the prosecutor may be heard.(a) But a return that the prosecutor was heard of that and other crimes, without stating what crimes, has been held to be bad;(b) because it did not appear but the crimes were such as would not justify a disfranchisement, and the Court will intend nothing but what is sufficiently alleged.(c)

—.] 4th. *Proof that Causes of Removal are True.*—It should appear on the return, that on the hearing, &c., had in pursuance of the summons, &c., *the charge for which the prosecutor was removed [*204] was proved; it is not sufficient to state merely that he was present when the charge was made, and did not deny it.(d) The return should also describe the nature of the proof, which must be such as is allowed at common law.(e)

—.] 5th. *Removal founded on alleged Cause of Removal.*—The return should upon the face of it shew, that the judgment of amotion was founded upon the evidence given(f) against the prosecutor on the hearing had in pursuance of the summons.

—.] 9th. As to compensation for loss of office, see tit. *Compensation (Office)*.

ORGANIST.] *Election.*—The writ does not lie to command the vicar,

(w) R. v. Braithwaite's case, 1 Vent. 19; Com. Dig. tit. "Man." D. 3.

(x) R. v. Wilton (Burgesses), 5 Mod. 258. Exeter (City) v. Glide, 4 Mod. 37. S. C. 1 Show. 364. S. C. Ld. Raym. 223; Com. Dig. tit. "Mint." D. 4.

(z) R. v. Dyer, 1 Salk. 181. S. C. Ld. Raym. 1406. R. v. Johnson, Stra. 261. R. v. Wilton (Mayor), 2 Salk. 428. S. C. Ld. Raym. 225, nom. R. v. Chalke. S. C. 5 Mod. 255, 257. R. v. Exon (Mayor), 1 Show. 259, 366, 3rd edit., n. (c). R. v. Ipswich (Bailiffs), 2 Salk. 435. S. C. Ld. Raym. 1233. S. C. Holt, 444. R. v. Oxford (Mayor), Palm. 453. R. v. Liverpool (Mayor), Burr. 731. See 2 T. R. 181. R. v. The Bailly, 1 Keb. 33. R. v. Gloucester (City), 3 Buls. 189. R. v. Shrewsbury (Mayor), 7 Mod. 202.

(a) 5 Mod. 259. S. C. Salk. 428, supra; Com. Dig. tit. "Man." D. 3.

(b) R. v. Wilton (Mayor), 5 Mod. 259. Manaton's case, Raym. 365. See post, tit. "Return" (Certainty).

(c) Supra, n. (s). See post, tit. "Return."

(d) R. v. Faversham Fishers, 8 T. R. 352, 365; 2 B. & Ad. 705.† R. v. Richardson, Burr. 538. Harman v. Tappenden, 1 East, 562; and see 1 M. & S. 697. R. v. Carmarthen (Burgesses), 1 M. & R. 697; Bull. N. P. 202. R. v. Neal, 4 N. & M. 868.† R. v. Smith, 1 D. & M. 564. S. C. 5 Q. B. 614.† See tit. "Parish Clerk" (Return).

(e) R. v. Wilton (Mayor), 5 Mod. 258.

(f) 8 T. R. 354; Burr. 538, supra. R. v. Buckingham (Corp.), 10 Mod. 176, citing Bagg's case, 11 Rep. 97. R. v. Oxon (Mayor), 2 Salk. 429. R. v. Ipswich (Bailiffs), 2 Salk. 435. S. C. Ld. Raym. 1233.

&c., of a parish, to meet for the purpose of electing an organist for the parish church, although for all time of living memory, there may have always been an organist, who has been paid a stipend out of the church-rates.(g)

—.] *Admission*.—At a vestry meeting convened for the purpose of electing an organist, it was unanimously agreed that the course pursued on a former vacancy should be followed; namely, that a committee of the vestry should elect six out of the candidates, who should perform in the parish church each on a separate Sunday, and that one of the six candidates should be received. It was held, that this mode of proceeding was not unreasonable, and that the Court would not grant a mandamus to admit to the office a person in whose favour the greatest number of votes had been tendered, but who was not one of the six candidates.(h)

OVERSEERS OF THE POOR.] This subject is arranged as follows :—

OVERSEERS.				OVERSEERS— <i>Swearing in</i>			
Election	-	-	- 204	Duty, &c.	-	-	- 206
Appointment	-	-	- 205	Accounts	-	-	- 206
Application	-	-	- 205	Rendering	-	-	- 206
Affidavits	-	-	- 205	Allowance	-	-	- 206
Return	-	-	- 205	Payment	-	-	- 207

—.] *Election*.—The writ lies to command justices of the peace to hold, *under the provisions of a local act, a petty sessions, and [*205] thereat receive from the vestry clerk a list of the names of those nominated by the inhabitants to serve the office of overseers of the poor, and to select and appoint therefrom certain of them to serve such office ;(i) and also to command parish officers to produce the poor-rate and other books, at a scrutiny of the votes given at a poll which has been taken for the election of overseers.(j)

—.] *Appointment*.—The writ will also be granted to command justices of peace to appoint overseers for a place by law entitled to have them,(k) notwithstanding it may be extra-parochial, if it be a vill, which

(g) Ex parte Le Cren, 2 D. & L. 571. S. C. 14 L. J., N. S. 34, Q. B. It is not an office known to the law. Ante, p. 113, n. (g). See tit. "Office" (Known to the Law.)

(h) 2 D. & L. 571, supra. See tit. "Office" (Admission).

(i) R. v. Hedger, 4 P. & D. 61. S. C. 12 A. & E. 139, 151.† S. C. 9 L. J., N. S. 117, M. C. See tits. "Act of Parliament," "Churchwarden" (Election), "Office" (Election), "Parish" (Officers, Election).

(j) R. v. Fall, 1 G. & D. 118. S. C. 1 Q. B. 636.† See tits. "Church" (Church Trustees), "Churchwarden" (Election), "Vote." And post, p. 208, n. (o).

(k) Ante, p. 9, 27, 28. R. v. Horton, 1 T. R. 374. R. v. Newell, 4 T. R. 266. R. v. Salop (J.), 3 B. & Ad. 910.† R. v. Worcestersh. (J.), 12 A. & E. 28. S. C. 3 P. & D. 465. S. C. 9 L. J., N. S. 81, M. C. S. C. 4 Jur. 1009. R. v. Middlesex (J.), Say. 148. R. v. Lancaster (J.), 2 Barn. 430, 431. R. v. Palmer, 8 East, 416; Bac. Abr. tit. "Man." (D.)

(l) R. v. Rufford (Inhabs.), Str. 512. S. C. Fortes. 321. S. C. 8 Mod. 39. S. C.

must be shewn on the affidavits ;(*l*) or for a hamlet, which never before had overseers, if entitled to have them.(*m*) So where a parish consists of several townships, some of which maintain their own poor, and have overseers separately appointed, the Court will grant a mandamus to command a separate appointment,(*n*) notwithstanding the statutory period of time within which they should have been appointed, may have expired.(*nn*)

The writ does not, however, lie to command an overseer to allow inspection of his appointment, such an application being properly the subject of an appeal to the sessions.(*o*)

— . *Application ; Affidavits.*—The affidavits must expressly shew that the place in question actually is or is reputed to be a vill,(*p*) or otherwise as by act of Parliament, &c., entitled to have overseers.

— . *Return.*—It is a good return to such a mandamus, that the place for which the overseers are sought to be appointed is not entitled to have them.(*q*)

— .] *Swearing in.*—The writ also lies to command churchwardens to *perform the ministerial act of swearing in overseers of the poor ;(*r*) and the rule for this purpose is absolute in the first [*206] instance.(*s*)

— . *Duty, &c.*—The Court will not, by mandamus, command an overseer to join in doing a particular act, if there be a concurrence of the majority, because that is sufficient ; but if one will neither do nor join in the doing of an act which he ought to do, the Court, in either case, will grant a mandamus to compel him.(*t*)

— .] *Accounts, Rendering.*—As justices of the peace have, under stat. 17 Geo. 2, c. 38, a discretionary power whether or not they will commit overseers for not rendering an account ; so the Court of B. R. will

Foley, 9, cited in 2 Salk. 486, marg. R. v. Lancash. (J.), 1 D. & R. 485.† R. v. Sparrow, 7 Mod. 393, where see form of writ. S. C. Stra. 1123, and cases there cited. See 1 T. R. 374, supra ; Com. Dig. tit. “Man.” (A.) R. v. Bedfordsh. (J.), Cald. 157. R. v. Peterborough (J.), Cald. 238 ; Bac. Abr. tit. “Man.” (D.) And tit. “Churchwardens.”

(*m*) R. v. Westmoreland (J.), T. 19 and 20 Geo. 2 ; 1 Wils. 138 ; Com. Dig. tit. “Man.” (A.)

(*n*) R. v. Horton, 1 T. R. 374. R. v. Palmer, 8 East, 416, and see R. v. Walsall, 2 B. & A. 157.†

(*nn*) Ante, p. 22, n. (*z*). R. v. Sparrow, supra, n. (*l*). See tit. “Act of Parliament.”

(*o*) Ante, p. 21. R. v. Harrison, 16 L. J., N. S. 33, M. C. See tits. “Books, &c.,” “Quarter Sessions” (Appeal).

(*p*) Ante, p. 27, 28. R. v. Bedfordsh. (J.), Cald. 157, 238. See post, tits. “Affidavits,” “Application” (Affidavits).

(*q*) R. v. Welbeck (Inhabs.), Stra. 1143. And see Burr. 1391, 1393, supra. See ante, tit. “Office” (Restoration, Return), and post, tit. “Return.”

(*r*) R. v. Manchester (Churchwardens), 7 D. 707. See tits. “Churchwardens” (Swearing in), “Office” (Swearing in). See post, tit. “Return,” and ante, p. 12.

(*s*) Ibid. See post, tit. “Rule.”

(*t*) Ante, p. 9, 15. R. v. Beeston, 3 T. R. 592. See tits. “Alderman” (Enforcing Duty), “Corporation Municipal” (Duties, &c.), “Office” (Enforcing Duties), “Poor.”

not command them to issue their warrant, under that statute, against the overseers, on their default.(u)

The writ, will, however, be granted to command overseers, &c., to pass their accounts, pursuant to stat. 50 Geo. 3, c. 49.(v) So it lies to command the Quarter Sessions to hear and determine a complaint against ex-overseers, &c., for not having signed, passed, and delivered to the succeeding overseers, &c., proper accounts conformably with stat. 17 Geo. 2, c. 38; to which the defendants may return that they have, in fact, signed, &c. their accounts.(w) But a mandamus to command ex-overseers to account under stat. 43 Eliz. c. 2, with the then present overseers, has been quashed, because by such statute, the account is to be rendered to the justices, &c., and not to the overseers.(x) So it will not lie to command them to account, unless it appear that there is no other remedy.(y) So where overseers produce their accounts to the auditor appointed by the poor law commissioners, but refuse to furnish particulars of the items of those accounts, the Court will not grant a mandamus, to compel them to do so, the auditor having it in his power to disallow such charges.(z)

—.] *Allowance.*—The writ lies to command justices to examine, allow, and pass the accounts of the overseers of the poor, under stat. 50 Geo. 3, c. 49, s. 1 (a), and also to command them to swear such overseers [*207] to their *accounts, under stat. 17 Geo. 2, c. 38; but if the justices have a legal objection to do so, they may return it.(b) The application for the writ is granted as of course.(c)

The writ will also be granted to command the Quarter Sessions to enter continuances, and receive and hear an appeal, which ought to be received, against the allowance of overseers' accounts, &c.(d) So as to an appeal against an allowance of the accounts of an assistant overseer, unless there be a limitation in the warrant of his appointment, which prevents his accountability to the parish.(e) So against the allowance of the accounts

(u) Ante, p. 12, 15. R. v. Norfolk (J.), 1 N. & M. 67.† See tits. "Accounts," "Churchwardens" (Accounts).

(v) Ante, p. 9. R. v. Warwicksh. (J.), 2 D. & R. 299.† 5 B. & C. 430.† See tits. "Act of Parliament," "Churchwardens" (Accounts), "Constable" (Accounts).

(w) R. v. Worcestersh. 3 D. & R. 299.† R. v. Carrocke, 1 Bott. P. L. 299; Show. 395. See tit. "Churchwarden" (Accounts).

(x) Ante, p. 27, 28. Anon., 2 Salk. 525, 6.

(y) Ante, p. 18—27. R. v. Shepton Mallett (Overseers), 5 Mod. 421.

(z) R. v. Halifax (Overseers), 10 L. J. N. S. 81, M. C. See tit. "Auditor."

(a) Ante, p. 9. R. v. Cambridge (J.), 8 D. 89, citing R. v. Flockwold Inclosure, 2 Chit. 251. R. v. Barlow, 2 Salk. 609, and cases there cited. R. v. Eaton, 9 L. J. N. S. 98, M. C., per Parker, C. J. R. v. Townsend, 1 Bott. 305, p. 318. See tits. "Act of Parliament," "Churchwardens" (Accounts, Allowance, &c.)

(b) R. v. Middlesex (J.), 1 Wils. 125. Com. Dig. tit. "Man." (A.)

(c) 1 Wils. 125, supra, n. (b). See post, tit. "Application."

(d) Ante, p. 9, 11. R. v. Colchester (J.), 5 B. & A. 535.† S. C. 1 D. & R. 146.† R. v. Norfolk (J.), 2 B. & Ad. 944.† R. v. Gloucestersh. (J.), 1 B. & Ad. 2.† R. v. Dorsetsh. (J.), 15 East, 198. R. v. Worcestersh. (J.), 5 M. & S. 457. See tit. "Quarter Sessions" (Appeal).

(e) R. v. Watts, 7 A. & E. 464.† R. v. Worcestersh. (J.), 5 M. & S. 457.

of ex-overseers, and this though a special sessions may have previously allowed them, under stat. 50 Geo. 3, c. 49, s. 1.(f)

But as to the power of Quarter Sessions to allow accounts submitted to them annually by overseers, under stat. 50 Geo. 3, c. 49, s. 1, on their going out of office, is not taken away by stat. 4 & 5 Wm. 4, c. 76, s. 47, which requires such accounts to be passed quarterly, before an auditor appointed by the poor law commissioners; therefore where a sum disallowed by the auditor, at his quarterly audit, was afterwards allowed by justices, in passing the annual accounts, the Court refused to command the justices to to order the overseers to pay over to their successors, the sum which had been so disallowed by the auditor.(g)

— — — *Payment.*—On a proper case being shewn, the Court will grant the writ to command justices to proceed on a complaint against overseers, under stats. 43 Eliz. c. 2, ss. 2 & 4, and 17 G. 2, c. 38, s. 3, for refusing to pay over the balance of money in their hands,(h) and also if necessary and proper to issue a distress warrant against them, in order to compel such payment.(i) A writ for such purpose will be granted upon the application of one only of the existing overseers, although the others refuse to concur in the application.(j)

The writ also lies to command overseers to pay to the treasurer of an union, certain sums of money in pursuance of orders of guardians of the poor, and to levy a rate for that purpose, if necessary.(k)

*PALACE COURT.] See tit. *Courts Inferior (Palace Court)*. [*208]

PAPERS OFFICIAL.] See titles *Accounts; Company; Books; Manor (Rolls, Inspection); Peace (Clerk of); Records, &c.*

PARISH.] This subject is arranged as follows:—

PARISH.					PARISH.				
Meeting	-	-	-	208	Burial of parishioners	-	-	209	
Officers	-	-	-	208	Loan, &c.	-	-	209	
Election	-	-	-	208	Repayment	-	-	209	
Auditors	-	-	-	208	Appeal	-	-	210	
Accounts	-	-	-	208	Reimbursement	-	-	210	
Books, &c.	-	-	-	209	Payment of money	-	-	210	
Inspection	-	-	-	209	Rates	-	-	210	
Delivery, &c.	-	-	-	209	Defaulters	-	-	210	

(f) 5 B. & A. 535.† S. C. 1 D. & R. 146.† Supra, n. (d).

(g) R. v. Dartmouth (Earl), 1 D. & M. 126. S. C. 5 Q. B. 878.†

(h) R. v. Carter, 4 T. R. 246; 2 Sess. Cas. 283; 2 M. & S. 343; Stra. 992; Bac. Abr. tit. "Man." (D.) See tits. "Churchwardens," "Constable" (Accounts, Inspection), "Quarter Sessions" (Justices).

(i) R. v. Essex (J.), 3 B. & Ad. 941.† R. v. Somersetsh. (J.), M. 18 Geo. 2, Stra. 992. R. v. Pascoe, 2 M. & S. 343. Com. Dig. tit. "Man." (A.) R. v. Staffordsh. (J.), 13 L. J., N. S. 81, M. C. But see R. v. Norfolk (J.), 1 N. & M. 67.† See post, tit. "Quarter Sessions" (Justices). And see stats. 6 & 7 Vict. c. 67, s. 3, 9 & 10 Vict. c. 113 (l.), App., and ante, p. 142, n. (z).

(j) 2 M. & S. 343, supra, n. (i). See post, tit. "Application."

(k) R. v. Todmorden (Overseers), 11 L. J., N. S. 129, M. C. See tits. "Constable," "Money," "Poor" (Relief, &c.)

MAY, 1852.—17

—.] *Parish Meeting*.—The Court of B. R. will, on a proper case being laid before it, issue a mandamus to command churchwardens, &c. to convene a meeting of the parishioners.(l)

—.] *Officers, Election*.—The writ also lies to command them to proceed to the election of parish officers,(m) as to proceed to hold a poll and complete the election of trustees for lighting and paving, under a parish act.(n) So it lies to command parish officers to produce the rate-books and other books at the scrutiny of a poll, which had been taken at the election of churchwardens, overseers, &c.(o)

—.] *Auditors*.—The writ lies to command churchwardens to assemble the parishioners to elect a vestry and auditors of accounts for the parish, under a parish act.(p) But where such an act confers a power of investigating accounts upon auditors to be annually elected, and to be summoned by the vestry clerk at certain stated intervals to audit the accounts, the Court will not grant a mandamus to command the latter, when new auditors have been elected for the succeeding year, to call a meeting of the old auditors to audit the accounts for the past year.(q)

—.] *Accounts*.—The writ lies to command the production of parish accounts, &c., in order to be audited.(r)

*—.] *Books, &c., Inspection*.—The writ lies to allow a [*209] parishioner to have inspection and copy of parish books, they having an interest in them similar to that which a copyholder has in manor rolls.(s) But an application by rate-payers for a mandamus to give inspection of parish books containing entries of assessments to the poor rate and arrears in the payment has been refused.(t) So a parishioner has no right to inspect parish books for the purpose of gaining information which may be useful to him, with a view to support his claim to an estate in the parish, and therefore the Court will refuse a mandamus

(l) Ante, p. 12. R. v. St. Margaret's (Parish), 4 M. & S. 250, cited in 1 N. & P. 58.† See tits. "Churchwardens," "Corporation Municipal" (Duties), "Vestry."

(m) Ante, p. 12. R. v. Stoke Damerel, 5 A. & E. 584.† S. C. 1 N. & P. 56.† See tits. "Auditors" (Parish), "Churchwardens," "Office" (Election), "Returning Officer."

(n) R. v. St. Luke's (Vestrymen), 2 N. & M. 464.† See tits. "Act of Parliament" "Borough," "Corporation Municipal" (Duties).

(o) R. v. Fall, 1 G. & D. 118. S. C. 1 Q. R. 636.† See tits. "Church" (Church Trustees), "Corporation Municipal" (Duties), "Office" (Election), "Overseers."

(p) R. v. St. Pancras, 3 N. & M. 425,† tits. "Act of Parliament," "Auditor," "Churchwardens" (Auditor), "Vestry."

(q) In re St. Giles, &c., 1 D. 540. See tit. "Act of Parliament."

(r) R. v. St. Pancras, 6 A. & E. 314.† S. C. 1 N. & P. 507,† where see form of writ; 6 A. & E. 321† (a). R. v. St. Pancras, 3 A. & E. 535.† S. C. 5 N. & M. 224,† where see form of writ. R. v. St. Andrew's, 13 L. J., N. S. 341, Q. B., where see form of writ. S. C. 6 Q. B. 78.† See tits. "Accounts, Books, &c." "Churchwardens" (Accounts), "County," "Overseers" (Accounts).

(s) Love v. Dr. Bently, 11 Mod. 134, where the application was granted in aid of an action for a false return to a mandamus; in such a case the rule is absolute in the first instance. Anon., 2 Chit. 290.† But see R. v. Arnold, 4 A. & E. 657.† See tits. "Books," "Company," "Corporation Municipal" (Books), "County," "Livings," "Manor" (Rolls), "Papers, Official."

(t) R. v. Staffordsh. (J.), 6 A. & E. 90, 102.† R. v. St. Marylebone, 5 A. & E. 268.† S. C. 6 N. & M. 600, impugning R. v. Leicester (J.), 4 B. & C. 891.†

for that purpose.(u) The right to inspect parochial documents also lies under the further restriction, that the applicant must not claim adversely to the parish.(v)

—.] —. *Delivery, &c.*—It has been held, that a mandamus will not lie to command ex-churchwardens to deliver the parish books to their successors, for the reason, that a dispute between parish officers as to which has a right to keep those books, ought to be tried at law upon a feigned issue.(w) But the writ has since been granted to command a late overseer to deliver over parish books and moneys to a then present overseer; if, however, such late overseer be rendered incompetent to serve, in consequence of a conviction, as under stat. 4 & 5 Wm. 4, c. 76, the application for the rule must be supported by affidavits with the conviction annexed, for the Court ought to see whether there be a good conviction.(x)

—.] *Burial of Parishioners.*—As to burial of parishioners, see tit. *Burial*.

—.] *Loan, Repayment of.*—The writ lies to command parish officers to pay principal and interest borrowed under Gilbert's Act, 22 Geo. 3, c. 83, after a lapse of thirty years, and no demand made, the charge being by the act still in force;(y) but the Court will not command a rate to be made for repayment of such loan, if neither a payment nor a provision have *been made by the parish for more than twenty [*210] years previously to the application.(z)

—.] *Appeal.*—The writ lies to enter continuance and hear an appeal against an order of the directors of a parish, for the payment of sums due on annuities and as interest on loans.(a)

—.] *Reimbursement.*—It is doubtful whether the writ lies to reimburse money over paid on parish rates, notwithstanding the parish ought, at common law, to make a rate to reimburse, &c.(b)

—.] *Payment of money.*—The writ, however, lies to command the overseers of a parish within an union, to pay their proportion of the expenses of the union to the treasurer, and that if they have not sufficient

(u) R. v. Smallpiece, 2 Chit. 288.

(v) R. v. Westowe (Overseers), 1 N. & P. 223.† S. C. 5 A. & E. 786.† Cox v. Copping, 5 Mod. 396. S. C. 12 Vin. Abr. Evid. (F. b), pl. 3. S. C. Ld. Raym. 337; 2 Chit. 288,† supra. See tit. "Manor" (Rolls).

(w) Ante, p. 24. R. v. Street, 8 Mod. 99. But see stat. 17 Geo. 3, c. 38, s. 3; Anon., 2 Chit. 255;† Bac. Abr. tit. "Man." C.

(x) R. v. Simms, 4 D. 294. R. v. Bletshow, 1 Bott's P. L. 300. S. C. nom. Puse v. Clapham, 1 Wils. 305. R. v. Fox, 1 W. W. & H. 4. See tit. "Conviction," and ante, p. 206, 207.

(y) R. v. Bighton (Churchwardens), 1 N. & P. 775.† S. C. 6 A. & E. 794, 798,† n. And see tits. "Church" (Loan), "Loan," "Money." See ante, p. 18—27.

(z) But see R. v. St. Paul, Shadwell, 1 M. & R. 591, and see tit. "Rate."

(a) R. v. Salop (J.), 2 B. & Ad. 145.† See tit. "Appeal," "Church" (Loan), "Company," "Loan," "Money."

(b) Case of Parish issues, Comb. 257, Eyre, J., saying, that he never knew of such a mandamus. See In re Lodge, 2 A. & E. 123.† S. C. 4 N. & M. 312,† nom. Ex parte Carlton High Dale (Inhabs.); and tits. "Churchwarden," "Constable," "High" (Reimbursement by), "Drainage."

funds in their hands for that purpose, that they forthwith do what is necessary for making, collecting, and levying a rate for that purpose, and that they pay the amount thereof to the treasurer.(c)

—.] *Rates*.—The writ will be granted to command the making a parish rate;(d) but there must be a legal duty on the parish to make it.(e) Thus the Court will grant a mandamus to command commissioners entrusted by act of Parliament with the regulation of the expenditure of a parish, to levy a rate for the purpose of paying off a sum borrowed on the credit of the rates by former commissioners, without pledging their personal responsibility, where the liabilities created under the former acts are reserved by the new act; although the latter direct that the commissioners shall be sued in the name of their clerk, and no interest have been paid within twenty years.(f)

So the writ lies to command justices to enter continuances and hear an appeal against an order of sessions, for amending a rate made under the Parochial Assessment Act, 6 & 7 Wm. 4, c. 96, s. 6.(g)

—.] *Defaulters*.—The writ also lies to command justices to issue distress warrants on nonpayment of parish rates.(h)

[*211] *PARISH CLERK.] It is clearly settled that the writ of mandamus lies for the office of parish clerk,(i) because it is a temporal, and not an ecclesiastical, office,(j) though in part it concerns the ministration of divine service.(k) It is both a freehold office, being prima facie an appointment for life;(l) and also a public one,(m) the duties being, to

(c) *R. v. Todmorden (Overseers)*, 4 P. & D. 553. S. C. 1 Q. B. 185,† where see form of writ, &c. *R. v. St. Andrews*, 10 A. & E. 726.† See tits. "Money," "Poor" (Rate), "Rate."

(d) *R. v. St. Saviour's*, 7 A. & E. 925.† S. C. 3 N. & P. 126. S. C. 1 N. & P. 496.† *R. v. Bangor (Overseers)*, 16 L. J., N. S., 58, M. C. See tits. "Poor" (Rate), "Rate."

(e) Ante, p. 12. *R. v. Carpenter*, 6 A. & E. 794.† S. C. 1 N. & P. 775.† *R. v. Bangor (Churchwardens)*, 16 L. J., N. S. 58, M. C.

(f) *R. v. St. Paul, Shadwell*, 1 M. & R. 591. See tit. "Church."

(g) *R. v. St. Alban's (J.)*, 1 P. & D. 148. S. C. 8 A. & E. 932.†

(h) *R. v. Dyer*, 2 A. & E. 606.† *R. v. Hughes*, 3 A. & E. 428.† *R. v. Hales*, 3 A. & E. 494.† *R. v. Mirehouse*, 2 A. & E. 644.† See tit. "Quarter Sessions" (Justices), and stat. 6 & 7 Vict. c. 67, s. 3, App., as to the indemnity which is thereby provided for any matter done in the due execution of a writ of mandamus; also 9 & 10 Vict. c. 113, s. 8 (I).

(i) Ante, p. 12. *Ille's case*, 1 Vent. 143. *R. v. London (Mayor)*, 2 T. R. 180, 183, n. (b). *R. v. Morpeth (Bailiffs)*, Stra. 59. *R. v. Dr. Bland*, 7 Mod. 356, citing 2 Roll. Abr. 234. *R. v. Patrick*, 2 Keb. 168, per Twisden, J. *Hurst's case*, 1 Lev. 75. *Lee v. Drake*, 2 Salk. 468; but it was refused in T. 17 Car. 1, cited in Stamp's case, 1 Keb. 5, and in *R. v. Middleton*, 1 Keb. 631, per Twisden, J., where it is erroneously stated to be an ecclesiastical office.

(j) Say. 159, infra. *Anon.*, 1 Keb. 286, pl. 94. *Davis's case*, II. 4 Geo. 1, cited in Stra. 897. *Parish Clerk's case*, 13 Rep. 70. *R. v. Warren, Cowp.* 370. *Leigh's case*, 3 Mod. 335. See tit. "Office."

(k) *Parker v. Clerk*, 6 Mod. 253, per Holt, C. J. See ante, p. 178, n. (r), (s), (t).

(l) *R. v. Ashton*, Say. 159. *Anon.*, 2 Chit. 254. Bac. Abr. tit. "Man." C. See tit. "Office" (Freehold).

(m) Agreed in *Hurst's case*, 1 Lev. 75. See tit. "Office" (Public).

keep the ornaments of the church, and to register baptisms, funerals, &c.(n)

This subject is arranged as follows:—

PARISH CLERK.				PARISH CLERK.			
Appointment	-	-	- 211	Application	-	-	- 212
Admission	-	-	- 211	Affidavits	-	-	- 212
Deputy	-	-	- 211	Writ (Form of)	-	-	- 212
Swear in	-	-	- 211	Returns	-	-	- 212
Restoration	-	-	- 212	Drunkenness	-	-	- 213

—.] *Appointment*.—The writ lies to command him who has the right of appointment, whether by act of Parliament, custom, &c., as a rector, &c., to appoint a parish clerk.(o)

—.] *Admission*.—So the writ of mandamus has often been granted to admit to the office of parish clerk.(p) The application should be supported by an affidavit of due election.(q)

—.] —. *Deputy*.—The writ lies also to admit a deputy parish clerk; but not on the application of such deputy.(r)

—.] *Swear in*.—So the writ lies to swear in the clerk of a parish,(s) *duly elected, as according to custom, &c.(t) In his duty of [212] swearing in, the ordinary acts only ministerially, and not judicially.(u)

The writ has also been granted to swear into the joint offices of parish clerk and sexton.(v)

—.] *Restoration*.—A parish clerk, although appointed by the minister, has, as before stated,(w) prima facie a freehold in his office, holding it quamdiu se bene gesserit: and, therefore, he cannot be removed without legal cause, which must be shewn on the return, in order to give the prosecutor an opportunity of answering it. If he be improperly removed, a

(n) R. v. Kingscleere (Churchwardens of), 2 Lev. 18. See tit. "Registrar, &c."

(o) Ante, p. 12. R. v. St. Anne's (Rector), P. 6 Geo. 3, Burr. 1878. Com. Dig. tit. "Man." (B.) See tits. "Act of Parliament," "Churchwarden" (Appointment). "Custom," "Office" (Appointment).

(p) R. v. Barker, Burr. 1267. Clerk of the Works case, 2 Sid. 112. See R. v. Patrick, 2 Keb. 168, per Twysden, J., 172, per Keeling, C. J. Speak *q. t. v. Bourn*, 2 Barn. 53, citing 2 Roll. Abr. 285; 2 Brown. 11, and 1 Lev. 75; 2 Lev. 18; 1 Vent. 143, supra; Bac. Abr. tit. "Man." C. See tit. "Office" (Admission).

(q) 2 Barn. 53, supra. Lee v. Drake, Salk. 468. See post, tit. "Application."

(r) Ante, p. 12. Parish Clerk's case, Lofft, 434. See tits. "Marches," "Office" (Deputy), "Recorder" (Deputy), "Registrar" (Deputy).

(s) Archdeacon Chester's case, M. 17 Car. 1, Rot. 31; Latch. 123, cited in Dr. Dolben's case, 1 Keb. 881: but in Clerk of Work's case, 2 Sid. 112, per Glyn, C. J., it is said he is not a sworn officer; Anon., Mar. 101; 2 Roll. Abr. 234, l. 35; Com. Dig. tit. "Man." (A.) See tit. "Office" (Swearing in), and ante, p. 12.

(t) Ante, p. 12. Clerk of St. Dunstan's case, Comb. 105. Orme v. Pemberton, Cro. Car. 589, 3. See tit. "Custom."

(u) R. v. Litchfield (Ep.), 7 Mod. 218. S. C. Kely. 287, nom. R. v. Rushworth. See tits. "Churchwardens" (Swearing in), "Office" (Judicial).

(v) R. v. Smith, 1 D. & M. 564. S. C. 5 Q. B. 614.† S. C. 13 L. J., N. S. 166, Q. B. See tit. "Sexton."

(w) Ante, p. 211; Say. 159, supra.

mandamus will be granted to restore him;(x) and therefore it is clearly settled, that on a proper case the writ will be granted to restore a parish clerk.(y)

—.] *Application; Affidavits.*—The affidavits in support of the rule should show a clear title to the office, that there is no plenarty,(z) and that the applicant has been removed therefrom;(a) it would be well that they should also state that the applicant was appointed for life, though such an allegation is not absolutely necessary,(b) as it is *prima facie* an office for life.(c)

—.] *Writ (Form of).*—The writ of mandamus to restore, &c. should be directed to him or them who has or have the power of appointment, as to the incumbent, and not as to the churchwardens.(d)

—.] *Returns.*—A return to a mandamus to restore, &c., will be insufficient, if it do not state that the applicant was before removal *summoned* to answer the charges alleged against him.(e) So if after summons [*213] to *attend and answer a charge of *intoxication*, &c., he be amoved upon insufficient evidence of the intoxication, &c. the Court will command his restoration.(f)

PARSON.] It has been said, that a mandamus will be granted to command a bishop to admit a clerk, where two patrons differ; and that it also lies to consecrate and to induct;(g) but these dicta seem to be of very questionable authority, for it has been expressly held, that the writ does not lie to restore a deprived parson to his living, because the law has

(x) *R. v. Warren*, Cowp. 370. *R. v. Davies*, 9 D. & R. 234.† *Bac. Abr.* tit. "Man." C. See tit. "Office" (Restoration, Return), and ante, p. 12.

(y) *R. v. Patrick*, 1 Keb. 610, and so agreed in *R. v. Rushworth*, W. Kely. 287. S. C. 7 Mod. 217, citing *R. v. Litchfield* (Ep.), M. 1 Geo. 2. Middleton's case, 1 Sid. 169. *R. v. Ashton*, Say. 159. *R. v. Argent*, Burr. 1783. See *R. v. Canterbury* (Archbp.), 8 East, 218. Davis's case, Hil., 4 Geo. 1, cited in *R. v. Ward*, Stra. 897. *R. v. Oxenden*, 1 Show. 219, and cases there cited. Parish Clerk's case, Lofft, 434, 5 Car. and 18 Car., cited in *The Protector v. Craford*, Sty. 457. *R. v. Dr. Gaskin*, 8 T. R. 209. *Parker v. Clerk*, 6 Mod. 253, per Holt, C. J. And see *R. v. Blooper*, Burr. 1044. *R. v. Neale*, 4 N. & M. 868.† *R. v. Smith*, 1 D. & M. 564. S. C. 5 Q. B. 614.† *Anon.*, 2 Chit. 254.† *Ex parte Cirkett*, 3 D. 327. *Tarrant v. Haxby*, Burr. 367. *Kid v. Dr. Watkinson*, 11 Mod. 221. *Anon.*, March. 101. *R. v. Dr. Wall*, 11 Mod. 261. *R. v. Proctor*, M. 15 Geo. 3, was never decided, see Cowp. 371, per Mansfield, C. J. See *R. v. Dr. Ashton*, 28 Geo. 2; 9 D. & R. 234,† supra; and see 2 Sid. 112; 1 Vent. 143. Bowles v. Neale, 7 C. & P. 262.

(z) Ante, p. 27, 28. Parish Clerk's case, Lofft, 434. See tit. "Manor" (Admittance), "Office" (Election). See post, tit. "Application" (Affidavits).

(a) *Ex parte Cirkett*, 3 D. 327. See tit. "Office" (Restoration, Application).

(b) *Anon.*, 2 Chit. 254. See post, tit. "Affidavits," "Application" (Affidavits).

(c) See ante, p. 211, n. (l).

(d) *Ex parte Cirkett*, 3 D. 327. See post, tit. "Writ" (Direction).

(e) Ante, p. 195, 200. *R. v. Dr. Gaskin*, 8 T. R. 209. Bagg's case, 11 Co. 99 a. *R. v. Smith*, 1 D. & M. 564. S. C. 5 Q. B. 614,† and cases there cited. See tit. "Office" (Restoration, Return).

(f) Ante, p. 197. *R. v. Neale*, 4 N. & M. 868.† As to a return of amoval for intoxication, see *R. v. Warren*, Cowp. 370. *Tarrant v. Haxby*, Burr. 367. See *R. v. Smith*, 1 D. & M. 564. S. C. 5 Q. B. 614,† where see form of return. As to a return of Drunkenness, see tit. "Office" (Restoration, Return).

(g) *Dr. Robert's case*, 2 Keb. 103, per Keeling, C. J. See tit. "Curate Livings."

provided other specific remedies, one of which is by *quare impedit*.^(h) So it has been held, that if the right of nomination be in one party, and that of presentation in another, and either impede the other in his right, a *quare impedit* lies; and therefore a mandamus will in such case be refused.⁽ⁱ⁾

It has been held, that an officer upon a corrupt contract against stat. Edw. 6, or guilty of simony, cannot be removed by mandamus.^(j)

—.] *Salary*.—The writ has, however, been granted to command churchwardens to pay to the prosecutor the arrears of his salary, to which he was entitled by a local act, to be paid out of the church rate, for his services as clergyman, in the performance of certain duties within the parish.^(k) So it has been granted to command a municipal corporation to secure by bond under the corporate seal the stipend of a minister or lecturer, duly entitled under stat. 5 & 6 Wm. 4, c. 76, s. 68.^(l)

—.] *Burial*.—As to burial, see that title, and title *Corpse*.

—.] *Living*s.—As to inspection of register of living, see tit. *Living*s.

—.] *Tithe*.—As to tithe, see that title, and title *Modus*.

PATENT.] The writ does not lie to enforce a contract arising out of a patent right. Thus, in a patent for an invention, it was stipulated that the patentee should supply his Majesty's service with so much of the invented article as should be required, on such reasonable prices and terms as should be settled for that purpose by the Admiralty. The patentee allowed the article to be made at the royal dock yards, and at the request of the Navy *Board, gave instructions for the [*214] guidance of the smiths there, without recompense for the use of the patent. The Court held, that a mandamus did not lie to command the Admiralty to settle the terms and fix a price to be paid to the patentee, it not being within the terms of the patent; for such a mandamus would be a sort of quantum meruit for the use of the patent;^(m) and that as not only debts,⁽ⁿ⁾ but unliquidated damage,^(o) may be recovered at com-

(h) Ante, p. 26. R. v. Barker, 1 W. Blac. 352. S. C. Burr. 1265. Ken's case, cited in R. v. Patrick, 1 Keb. 835. See R. v. St. John's Coll. Comb. 281. R. v. Bloer, Burr. 1045. See R. v. Patrick, 2 Keb. 168, per Twisdén, J. See tits. "Curate," "Dissenters," "Prebendary."

(i) Ante, p. 26. R. v. Stafford (Marquis), 3 T. R. 646; Com. Dig. tit. "Man." (B.)

(j) R. v. St. John's, Cambridge, Comb. 281. See tit. "Office" (Removal).

(k) Ex parte Scott, 8 D. 328. See tits. "Act of Parliament," "Contract," "Money."

(l) R. v. Liverpool (Mayor), 3 N. & P. 280. S. C. 8 A. & E. 176.† See tit. "Compensation" (Office).

(m) Ante, p. 18, 19, 20. Ex parte Perring, 6 N. & M. 477.† S. C. 4 A. & E. 949.† See tits. "Contract," "Money."

(n) M. 11, H. 4, fo. 28, pl. 53. See tit. "Crown." Ante, p. 11, n. (o), 20.

(o) Gervais de Clifton's case, P. 22, E. 3, fo. 5, pl. 12 (for damages done by the wardens of Nottingham Castle in cutting trenches in the Trent for four new mills built by the king). See ante, p. 11, 20, 21.

mon law against the Crown by petition of right, (*p*) so therefore, unless this complete and ordinary, though not very usual remedy be taken away by the patent, &c., the applicant is not entitled to avail himself of the extraordinary remedy by mandamus. (*q*)

PAVEMENTS.] See titles *Highway; Parish; Paving Rate; Way*.

PAVING RATE.]—See titles *Borough; Parish (Election); Rate*.

PEACE, ARTICLES OF THE.] *Taking, &c.*—The writ lies to command justices to take recognizances to articles of the peace, whether they be exhibited at sessions, &c., or in the Court of B. R. And such Court will, at the instance of a defendant, if he be in a very infirm state of health, command such justices to attend him for that purpose. (*r*)

But where a recognizance has been removed into the Court of B. R. for the purpose of being estreated, such Court will not, for the furtherance of the liberty of the subject, grant a mandamus to the justices to correct a clerical error vitiating the recognizance. (*s*)

PEACE, CLERK OF.] *Appointment.*—The writ lies for a clerk of the peace, he being appointed by the *custos rotulorum* under stats. 37 Hen. 8, c. 1, and 1 W. & M. c. 21, s. 5, for life, (*quamdiu se bene gesserit*), therefore the office does not become void on the *custos* being removed, nor can a succeeding *custos* at his pleasure remove a clerk appointed by a preceding *custos*. (*t*)

[*215] ———.] **Admission.*—So the writ lies to command an admission to the office of clerk of the peace. (*u*)

———.] *Restoration.*—The writ also lies to restore a clerk of the peace, if he have been improperly removed from his office, (*v*) whether by

(*p*) Mann. Exch. Pra., 2nd edit. 84. See tit. "Manor" (Royal Manor), and ante, p. 154, n. (*x*).

(*q*) See ante, p. 18, 19, and tit. "Manor" (Admittance). II. 2, E. 3, fo. 18, pl. 2; Fitzg. Abr. tit. "Age," pl. 75, tit. "Dette," pl. 17, tit. "Graunt," pl. 7, tit. "Petition," pl. 8, 10, 5, tit. "Travers," pl. 43, 156, 163, 164, and see *Ex parte Pering*, 6 N. & M. 477, † n. (*a*); and tit. "Execution."

(*r*) *R. v. Lewis*, 1 Barn. 166. S. C. Stra. 855. -S. C. Fitzg. 85. Seymour's case there cited, and Reynolds, J., remembered a Northumberland case in which it was also done. Fitzg. 85, pl. 13; 2 Sess. Ca. 68, pl. 2; Bac. Abr. tit. "Man." (D.); Com. Dig. tit. "Man." (A.) But see *R. v. Bushfield*, 2 Sess. Ca. 67. See tit. "Quarter Sessions" (Justices).

(*s*) Ante, p. 17, n. (*y*). *R. v. Stack*, 12 L. J., N. S. 58, M. C. See tits. "Prisoner," "Quarter Sessions" (Records).

(*t*) *R. v. Evans*, 1 Show. 282. S. C. Holt, 188; Com. Dig. tit. "Man." (A.) *Harcourt v. Fox*, 1 Show. 426, 3rd edit.; Bac. Abr. tit. "Man." (C.) See tits. "Act of Parliament," "Custos Rotulorum," "Office" (Public, Freehold).

(*u*) See p. 12. *R. v. Surrey (J.)*, Say, 144. See tit. "Office" (Admission).

(*v*) Ante, p. 12. *Harcourt v. Fox*, 1 Show. 426. S. C. 506, 556. S. C. 4 Mod. 167. S. C. Comb. 209. S. C. Show. P. C. 158. S. C. 12 Mod. 42. S. C. Holt, 188, 189. *R. v. Evans*, 1 Show. 282. S. C. 4 Mod. 31. S. C. 12 Mod. 13. S. C. Holt, 188. *R. v. Baines*, 6 Mod. 193; 4 Com. Dig. 154. *Owen v. Saunders, Ltd.* Raym. 158, 161. See tit. "Office" (Restoration).

the *custos rotulorum*, or not. (*w*) Thus the *custos* cannot remove a clerk of the peace, upon the ground that a demand has been made of the county rolls, and he did not deliver them: for the clerk of the peace is a distinct officer, and not a mere servant, and his business is to make up the rolls, and to enter them; also a clerk of the peace is not removable, but for a misdemeanor, or higher offence. (*x*) So the writ to restore, &c., will be granted, if he be improperly removed by the justices at Quarter Sessions. (*y*) Thus, where a clerk of the peace had been dismissed by the sessions, no charge in writing having been made against him, and exhibited, as directed by stat. 1 Wm. & M. c. 21, (*z*) the Court awarded a writ for his restoration.

But although the appointment of "clerk of the peace," under stat. 1 Wm. & M. c. 21, must be "*quamdiu se bene gesserit*;" yet if he be appointed "*durante bene placito*," of the *custos*; the Court, on his deprivation, will not grant a *mandamus* to restore him; for his appointment being void, he cannot shew title to the office. (*a*)

PENSION.] If public officers, as the lords of the treasury, have the custody of money for a specific purpose, as for the payment of a pension, &c., and do not fulfil that purpose, a *mandamus* will be granted, commanding them so to do. Thus the Court has granted a *mandamus* to command the lords of the treasury forthwith to issue a treasury minute or authority to the paymaster of civil contingencies, or other proper officer, directing and authorizing him to pay the amount or arrears of a retired allowance to a public officer, under stat. 3 Geo. 4, c. 113, it having been voted by Parliament, and the *money for the payment [*216] thereof being in the treasury for his benefit; for the claimant has no other remedy, and the writ in such a case is not against the Crown, (*b*) but against officers into whose hands money has been paid under an act of Parliament, for the use of an individual; they being protected (*c*) from an action (*d*) for the recovery thereof. If, however, it should be, on any

(*w*) *Harcourt v. Fox*; *R. v. Evans*, *supra*. *Sanders v. Owen*, 5 Mod. 387. S. C. Carth. 426. S. C. 2 Salk. 467. S. C. Holt, 190; 4 Mod. 293, 295.

(*x*) *R. v. Evans*, 12 Mod. 13. S. C. Holt, 188. S. C. 4 Mod. 31. S. C. 1 Show. 282. See tits. "County" (Records), "Custos," "Office" (Restoration, Returns).

(*y*) *R. v. Evans*, 4 Mod. 31. *R. v. Lloyd*, Stra. 997. See stat. 1 W. & M. c. 21, as to clerks of the peace.

(*z*) *R. v. Evans*, 1 Show. 282, and n. (*b*). S. C. Holt, 188. S. C. 4 Mod. 31, n.

(*a*). S. C. 12 Mod. 13. See *Harcourt v. Fox*, 1 Show. 427, &c.; 6 Mod. 192. *R. v. Lloyd*, Stra. 996, 997. *Saunders v. Owen*, 5 Mod. 386. S. C. Carth. 426. S. C. Comb. 317. S. C. 2 Salk. 467. S. C. Ld. Raym. 158, 166; Com. Dig. tit. "Man." (A.). See tit. "Office" (Restoration).

(*a*) Ante, p. 27, 28. *R. v. Owen*, 4 Mod. 293. S. C. Comb. 317. See 1 Show. 282, n. (*b*). See tit. "Office" (Restoration). Ante, p. 191, 192, n. (*c*).

(*b*) Ante, p. 18. See tits. "Acts of Parliament," "Crown," "Manor" (Royal Manor), "Money," "Treasury Lords."

(*c*) *Gidley v. Ld. Palmerston*, 3 B. & B. 275.†

(*d*) Ante, p. 20. *R. v. Treasury (Lords)*, 4 A. & E. 286.† S. C. 5 N. & M. 589.† See tits. "Half-pay," "Treasury Lords."

occasion unsafe, with reference to the public service, to make a payment of this kind, the fact may be stated on the return.(e) But where the lords of the treasury have a discretionary power, as that of revoking a minute by which they have granted a pension or superannuation allowance, under stat. 3 Geo. 4, c. 113, upon the retirement of the grantee from an office held during the pleasure of the Crown, there a mandamus to restore such a treasury minute revoked by them, or to submit a vote to Parliament in the estimates for the grant of it,(f) will be refused. Also where the Court for the relief of Insolvent Debtors, under stat. 1 & 2 Viet. c. 110, s. 56, had made an order for the payment of a certain portion of an insolvent's pension to his assignees, and had required the Commissioners of Excise, by whom it was payable, to consent to such order, but who had refused, the Court declined to grant a mandamus to command them so to do, because they have a discretionary power to confer or withhold their consent.(g)

PERMIT.] See titles *Certificate*; *Excise (Commissioners)*; *Ship*.

PERPETUAL CURATES.] See tit. *Curate (Perpetual Curacy)*.

PETTY SESSIONS.] See titles *Courts Inferior*; *Quarter Sessions (Petty)*.

PHYSICIANS, COLLEGE OF.] *Duty, &c. to Examine*.—A writ of mandamus does not lie to command the president and college or commonalty of physic in London, to examine as to qualification and fitness, in order to admission into such corporation, as a member or fellow thereof,(h) it being a society formed spontaneously by certain individuals, and like to the Inns of Court, which are perfectly voluntary societies;(i) nor will the Court of B. R. interfere by mandamus, with the discretion of the College of Physicians.(j)

*—.] *Admission*.—Nor does the writ lie to command the [*217] admission of one to be a member of the fellows and licentiates of the College of Physicians.(k) So it does not lie to command the College

(e) A. & E. 295.† S. C. 5 N. & M. 589,† supra. See *The Banker's case*, S. C. R. v. Hornby, 5 Mod. 29. S. C. 14 How. St. Tr. 1, and 4 A. & E. 996.† S. C. 6 N. & M. 508.†

(f) Ante, p. 12. R. v. Treasury (Lords), 4 A. & E. 976.† S. C. 6 N. & M. 505.† And see R. v. Treasury (Lords), 6 N. & M. 508.† S. C. 4 A. & E. 984.† S. C. 2 H. & W. 67. Ex parte Ricketts, 4 A. & E. 1001.† See tits. "*Alehouse*" (License), "*Discretion*."

(g) Ante, p. 12. In re Howard, 2 D. & L. 753. S. C. 14 L. J., N. S. 113, Q. B. See tits. "*Half-pay*," "*Insolvent*."

(h) R. v. Physicians' (Coll.), 7 T. R. 282, 290, 295, n. (a). See tits. "*College*" (Admission), "*Inn of Court*" (Admission).

(i) 2 Show. 178. See tits. "*Inn of Court*," "*Visitor*."

(j) Ante, p. 12—15; 7 T. R. 291, supra. See tits. "*Discretion*," "*Lectureship*," (License).

(k) Dr. Askew's case, Burr. 2186. See R. v. Chester (Ep.), 1 T. R. 398. R. v. Physicians' Coll., 2 Show. 178. Dr. Goddard's case, 1 Lev. 19. S. C. 1 Sid. 29

of Physicians to admit a London licentiate into their fellowship ;(*l*) nor as an honorary fellow of that college ;(*m*) it not being a place of profit, nor advantageous to the holder, nor does it in the least relate to public government.(*n*)

—.] *Restoration*.—It has also been held that the writ does not lie to restore to the fellowship of such college.(*o*)

—.] *License*.—Nor will a mandamus lie to command the granting of a license to practise physic, although improperly refused, for the Court of B. R. has no jurisdiction.(*p*)

PLAINT.] See titles *Courts Inferior (Plaint)*; *Manor (Leet, Plaint)*.

POOR.] This subject is arranged as follows :—

POOR.				POOR RATE—Signing, allowing, &c.			
Relief	-	-	- 217	Rule	-	-	- 222
Maintenance	-	-	- 217	Appeal against rule	-	-	- 222
Removal	-	-	- 218	Collecting rate	-	-	- 223
Appeal	-	-	- 218	Rate Books	-	-	- 223
Case	-	-	- 219	Inspection	-	-	- 223
Apprentice	-	-	- 219	Delivery	-	-	- 223
POOR RATE.				Defaulters	-	-	- 223
Making	-	-	- 220	Application	-	-	- 225
Application	-	-	- 221	Rule	-	-	- 225
Rule	-	-	- 221	Reimbursement	-	-	- 225
Form of Writ	-	-	- 221	Poor Law Commissioners	-	-	- 225

—.] *Relief*; *Maintenance*.—The writ lies to command the guardians, &c. of a parish to relieve the poor ;(*q*) also to command overseers to receive *into the workhouse, or otherwise provide for, the necessary relief and support of a casual pauper.(*r*) [*218]

It lies also to command justices to hear a complaint by overseers against an individual, for refusing to maintain his wife and child.(*s*) But it does not lie to command magistrates to make an order of maintenance on a

S. C. 1 Keb. 75, 84; Com. Dig. tit. "Man." (A. B.); Bac. Abr. tit. "Man." C. 3. See tit. "College" (Admission).

(*l*) R. v. Physicians' (Coll.), Burr. 2740, and cases there cited. Formerly, however, the Court granted the writ to swear into such office. Anon. 12 Mod. 666, per Holt, C. J. Dr Goddard's case, 1 Sid. 29. S. C. 1 Lev. 19. S. C. 1 Keb. 75, 84. R. v. Coll. of Physicians, 2 Show. 178.

(*m*) R. v. Physicians' (Coll.), 2 Show. 178, sometimes cited as Dr. Merrit's case. See also R. v. Alsop, 2 Show. 170. Dr. Goddard's case, 1 Sid. 29. S. C. 1 Lev. 19.

(*n*) See R. v. Askew, Burr. 2186. See tit. "Office" (Public).

(*o*) Dr. Goddard's case, 1 Sid. 29. S. C. 1 Lev. 19. S. C. 1 Keb. 75, 84, recognised in R. v. Middleton, 1 Keb. 625; Com. Dig. tit. "Man." (A. B.); Trem. Pl. Cor. 495, where see a form of writ; Bac. Abr. tit. "Man." C. 2. See tit. "College" (Fellow).

(*p*) Dr. Askew's case, Burr. 2189. See tits. "Lectureship" (License), "License."

(*q*) Ante, p. 12. R. v. Totness Union, 7 Q. B. 690.† S. C. 14 L. J., N. S. 148, M. C. See tits. "Guardians" (Duties, &c.), "Office" (Enforcing Duty).

(*r*) R. v. St. Pancras, 7 A. & E. 751.† S. C. 5 D. 722. The rule is absolute in the first instance. See tits. "Corpse," "Lunatic."

(*s*) R. v. Cumberland (J.), 4 A. & E. 695.† See tit. "Quarter Sessions" (Justices).

particular person or parish. (*t*) The writ lies also to command the churchwardens of one parish, to pay those of another, the costs of maintaining a pauper, previously to his removal. (*u*) So it lies to command a justice to back a warrant of distress, issued by magistrates, for the costs of a pauper's support, during the suspension of an order of removal, in pursuance of stat. 35 Geo. 3, c. 101, s. 2, (*v*) and the Court will command sessions to hear an appeal as to the costs of such maintenance. (*w*)

—.] *Removal; Appeal.*—The writ lies to command the Quarter Sessions, to enter continuances, and hear an appeal against an order of removal, which they have improperly, for any cause, refused to hear. (*x*)

(*t*) R. v. Middlx. (J.), 4 B. & A. 298, 300; † and see 4 B. & A. 271; † 3 B. & A. 590; † and Anon., 2 Chit. 257. See *infra*, "Office" (Officers Judicial), "Rate" (Making).

(*u*) R. v. Nottingham (J.), 2 Barn. 56; and see R. v. Monmouth (J.), 12 L. J., N. S. 126, M. C.; but see R. v. Radnorsh. (J.), 15 L. J., N. S. 151, M. C. See *tit.* "Bastards" (Costs), "Lunatic," "Money."

(*v*) R. v. Kynaston, 1 East, 116.

(*w*) Ante, p. 147, n. (*h*). R. v. Monmouthsh., 12 L. J., N. S. 126, M. C. R. v. Anglesea (J.), 12 L. J., N. S. 131, M. C. See *tit.* "Costs" "Lunatic."

(*x*) Ante, p. 12. R. v. Yorksh. (J.), 3 T. R. 150. R. v. Monmouthsh. (J.), 1 B. & Ad. 895.† R. v. Southampton (J.), 6 M. & S. 394. R. v. West Riding (J.), 4 M. & S. 327. R. v. Surrey (J.), 1 M. & S. 480. R. v. Buckinghamsh. (J.), 3 East, 342. R. v. Suffolk (J.), 6 A. & E. 109.† S. C. 1 N. & P. 306.† R. v. Northamptonsh. (J.), 6 A. & E. 111.† R. v. Shropsh. (J.), 7 East, 549. R. v. Wiltsh. (J.), 10 East, 406. R. v. Wiltsh. (J.), 1 East, 683. R. v. Sussex (J.), 7 T. R. 107. R. v. Flintsh. (J.), 7 T. R. 200. R. v. Yorksh. (J.), 1 Doug. 193. R. v. Gloucestersh. (J.), 1 Doug. 191. R. v. Frieston (Inhabs.), 5 B. & Ad. 598.† R. v. Lancash. (J.), 7 B. & C. 692.† R. v. Suffolk (J.), 4 A. & E. 319.† S. C. 5 N. & M. 503.† R. v. Cornwall (J.), 5 A. & E. 134.† S. C. 1 N. & P. 144.† R. v. Kelvedon (J.), 5 A. & E. 690.† R. v. Kimbolton (Inhabs.), 6 A. & E. 604.† R. v. Derbysh. (J.), 6 A. & E. 885.† S. C. 1 N. & P. 148, † n. (*a*). R. v. Warwicksh. (J.), 6 A. & E. 873.† S. C. 2 N. & P. 153.† R. v. Cornwall (J.), 6 A. & E. 894.† Ex parte Brosely (Inhabs.), 7 A. & E. 423.† S. C. 2 N. & P. 355. R. v. Sussex (J.), 10 A. & E. 684.† S. C. 3 P. & D. 42. R. v. Bridgewater (Inhabs.), 10 A. & E. 694.† R. v. Whitley Upper (Inhabs.) 11 A. & E. 90.† R. v. Ecclesall, 11 A. & E. 612.† R. v. Chesh. (J.), 8 D. 616, and see 1 P. & D. 88. S. C. 8 A. & E. 398.† R. v. Herefordsh. (J.), 8 D. 638. R. v. Middlesex (J.), 9 D. 163. R. v. West Riding (J.), 2 D., N. S. 708. R. v. Staffordsh., 2 D., N. S. 353. R. v. Salop (J.), 3 N. & P. 286. S. C. 8 A. & E. 173.† R. v. Derbysh. (J.), 3 N. & P. 591. R. v. West Riding (J.), 3 P. & D. 462. R. v. Monmouthsh. (J.), 3 D. 306. R. v. Leicester (J.), 4 D. 633. R. v. Norfolk (J.), 1 D. & R. 69, 74, 75.† S. C. 5 B. & A. 484; † 2 Nolan, 142. R. v. Suffolk (J.), 1 D. 163. R. v. Staffordsh. (J.), 1 D. 484. R. v. Gloucestersh. (J.), 3 D. 298. R. v. Lindsay (J.), 6 M. & S. 379. R. v. Caernarthensh. (J.), 4 B. & Ad. 563.† S. C. 1 N. & M. 368.† R. v. York (J.), 2 B. & C. 771.† R. v. Kent (J.), 8 B. & C. 639. R. v. Devon (J.), 8 B. & C. 640, † n. (*a*). R. v. Herefordsh. (J.), 3 T. R. 504. R. v. Derbysh. (J.), 4 T. R. 488. R. v. Norfolk (J.), 3 N. & M. 55.† R. v. Monmouthsh. (J.), 7 D. & R. 334, † where see form of rule. R. v. Salop (J.), 6 D. 28. R. v. Norwich (J.), 5 B. & A. 484.† R. v. Devon (J.), 1 Chit. 34. R. v. Essex (J.), 2 Chit. 385.† R. v. Middlesex (J.), 3 P. & D. 459. R. v. Salop (J.), R. v. Lancash. (J.), R. v. Suffolk (J.), 1 G. & D. 146. S. C. 2 Q. B. 85.† R. v. Kent (J.), 2 G. & D. 152. S. C. 2 Q. B. 686.† S. C. 11 L. J., N. S. 27, M. C. R. v. West Riding (J.), 2 Q. B. 505.† S. C. 1 G. & D. 706; 1 G. & D. 630. S. C. 2 Q. B. 705.† R. v. Carnarvonsh. (J.), 1 G. & D. 423. S. C. 2 Q. B. 325.† R. v. Lancash. (J.), 2 G. & D. 714. Ex parte Pontefract (Churchwardens), 3 G. & D. 188. S. C. 3 Q. B. 391.† R. v. Lancash. (J.), 3 G. & D. 296. S. C. 4 Q. B. 910.† R. v. Middlesex (J.), 4 Q. B. 807.† S. C. 12 L. J., N. S. 134, M. C. R. v. Surrey (J.), 1 D. & M. 106. S. C. 5 Q. B. 506, 508.† R. v. Kesteven (J.), 1 D. & M. 113. R. v. Merionethsh. (J.), 1 D. & M. 121. S. C. 6 Q. B. 163.† S. C. 13 L. J., N. S. 114, M. C. R. v. Lancash. (J.), 1 D. & M. 488. R. v. Denbighsh. 9 D. 509. R. v. Chesh. (J.),

*Also to command a recorder to enter continuances and hear [*219] such an appeal.(y)

The writ also lies to command justices to receive a complaint against the overseers and churchwardens of a parish, for refusing to pay the costs of an appeal, on an order of removal.(z)

—Case.—The writ also lies to command the Quarter Sessions to state a special case for the opinion of the Court, pursuant to an order of sessions, made on the hearing of an appeal against an order of removal.(a) But not where it is clear that such a proceeding could lead to no useful result; as where the chairman, in consequence of his own opinion, and that of the Court, upon the facts, refused to sign any statement, but one which would have excluded the point of law relied upon by the party demanding the case; but under such circumstances, the Court will command them to enter continuances, and hear the appeal.(b)

—.] *Apprentice*.—The writ lies to command justices to consider and determine whether there exists any objection to the allowance of the indenture of apprenticeship of a pauper.(c) But it will not be granted to *command parish officers, appellants against an order of removal, [*220] to produce the indenture of the apprenticeship of a pauper, sworn to be in their custody, at the instance of the prosecutors (respondents), in order that an assignment thereon indorsed, may be stamped, so as to be evidence on the hearing of the appeal, although the indenture be the deed of and between the parties named in the rule for the writ; because such an indenture is not a public document.(d)

—.] *Rate; Making*.—The writ lies to command the churchwardens of a parish, or some of them, to concur with the overseers in making a

1 D., N. S. 570. R. v. Staffordsh. (J.), 2 D., N. S. 353. R. v. Anglesea (J.), 1 D. & L. 170. Ex parte Harnley (Overs.), 1 D. & L. 673. R. v. Flintsh. (J.), 2 D. & L. 143. S. C. 13 L. J., N. S. 163, M. C. R. v. West Riding (J.), 2 D. & L. 488. R. v. Essex (J.), 1 B. & A. 210.† R. v. Derbysh. (J.), 6 A. & E. 612.† R. v. West Rid. (J.), 12 L. J., N. S. 37. R. v. West Riding (J.), 14 L. J., N. S. 119, M. C. S. C. 3 D. & L. 152. Ex parte Pontefract (Inhab.), 13 L. J., N. S. 5, M. C. R. v. Warwicksh. (J.), 6 Q. B. 752.† R. v. Surrey (J.), 15 L. J., N. S. 46, M. C. S. C. 3 D. & L. 573. R. v. Middx. (J.), 15 L. J., N. S. 100, M. C. R. v. Montgomerysh. (J.), 3 D. & L. 119. R. v. Middx. (J.), 3 D. & L. 745. R. v. Suffolk (J.), 16 L. J., N. S. 36, M. C. R. v. Staffordsh. (J.), 16 L. J., N. S. 53, M. C. R. v. Somersetsh. (J.), 16 L. J., N. S. 86, M. C. R. v. Durham (J.), 16 L. J., N. S. 112, M. C. R. v. Middx. (J.), 16 L. J., N. S. 135, M. C. See tits. “Courts Inferior” (Appeal), “Quarter Sessions” (Appeal).

(y) Ante, p. 12. R. v. Bath (Rec.), 1 P. & D. 469. S. C. 9 A. & E. 714.† R. v. Pontefract (R.), 2 Q. B. 548.† S. C. 2 G. & D. 700. S. C. 12 L. J., N. S. 81, M. C. See tits. “Office” (Enforcing Duty), “Recorder.”

(z) Ante, p. 218, n. (s). R. v. Long, 10 L. J., N. S. 124, M. C. See tits. “Costs,” “Mandamus,” p. 148, n. (i).

(a) R. v. Pembroke (J.), 2 B. & Ad. 391.† R. v. Effingham, 2 B. & Ad. 393,† n. (a). See ante, p. 11.

(b) Ante, p. 15, 16; 2 B. & Ad. 392,† supra. See tits. “Courts Inferior” (Case), “Quarter Sessions” (Case).

(c) R. v. Mills, 2 B. & Ad. 573.† See tits. “Apprentice,” “Freedom” (Company, &c., Admission), and ante, p. 12—15.

(d) Ante, p. 9, 10. R. v. Westowe (Overseers), 5 A. & E. 786.† S. C. 1 N. & P. 222.† See tits. “Papers, Official.”

rate.(*e*) But not without first appealing to the sessions, if such a course be open to the parties.(*f*)

The writ has also been granted to command justices to tax, rate, and assess a parish to the support of the poor, under stat. 43 Eliz. c. 2, s. 3.(*g*) The rate must, however, be a legal one; and therefore the writ does not lie to command justices to rate a parish within their jurisdiction, in aid of another parish having exclusive jurisdiction;(h) nor to command the making of a monthly rate for the relief of the poor, the rates being then made quarterly.(i) Nor will the writ be issued to make an equal rate,(j) unless the statute upon which the application is made, so direct it.(k) Nor does the writ lie to exempt from a rate persons who ought not to be rated.(l) Nor to direct the insertion of the names of particular persons, although it *be deposed that such names were left out to [*221] prevent votes for Parliament; the remedy being by appeal; for the Court never interferes further than to oblige the making of a rate, without meddling with the question, who is to be put in or left out? of which the parish officers are the proper judges, subject to an appeal.(m)

The writ does not lie to command overseers to make a rate to reimburse their predecessors certain moneys expended for the relief of the poor, such a proceeding being unnecessary, for if an overseer advance his own money, he may, whilst in office, get a rate for the relief of the poor, and reimburse himself out of the moneys arising therefrom, and the Court

(*e*) Bac. Abr. tit. "Man." (D). See tits. "Office" (Enforcing Duty), "Rate." Anon., 2 Chit. 254;† although some only of the churchwardens refuse, yet the writ must be prayed against and directed to all, and if the applicant be one of the parish officers he must pray the writ against himself. *R. v. Edlaston* (Churchwardens), 1 N. & P. 572.† S. C. W. W. & D. 163. S. C. 1 Jur. 53; 1 N. & P. 20,† n. (*a*). See post, p. 221, n. (*p*).

(*f*) Ante, p. 21. *R. v. Canterbury*, 1 W. Blac. 667. S. C. Burr. 2290. *R. v. St. Leonard*, 2 Salk. 483. S. C. Cas. t. Holt, 508.

(*g*) *R. v. Holbeche*, 4 T. R. 778. *R. v. Edwards*, 1 W. Blac. 637. *Lidleston v. Exeter* (Mayor), Comb. 422, 428. S. C. Fol. 19. *R. v. St. Mary's*, 8 Mod. 344. S. C. Stra. 700. *R. v. Canterbury* (Guardians), Burr. 2290. S. C. 1 W. Blac. 667. *R. v. Barnstable* (Inhabs.), 1 Barn. 137. Anon., 2 Barn. 83. S. C. Stra. 26. *R. v. Canton* (Overseers), 1 Barn. 299. *R. v. Spotland* (Overseers), 1 Barn. 137. Com. Dig. tit. "Man." (A.). *R. v. Barnwell*, 11 Mod. 206. S. C. Park, 74. *Dr. Butler v. Cobbett*, 11 Mod. 254. *R. v. Radnor* (J.), 2 D., N. S. 676. See tits. "Act of Parliament," "Rate." Ante, p. 9, 11.

(*h*) 4 T. R. 778; 1 Nolan, 121. But see ante, p. 92, n. (*a*), 135, n. (*t*).

(*i*) Ante, p. 16, 27, 28. *R. v. St. George* (Overseers), 2 W. Blac. 694.

(*j*) Bac. Abr. tit. "Man." (D). *R. v. Woebly* (Churchwardens), Stra. 1259. *R. v. Canterbury*, Burr. 2290. S. C. 1 W. Blac. 667. Anon., 2 Barn. 426; 1 Bott. 81; Stra. 1259; Com. Dig. tit. "Man." (B.). *R. v. Barnstable* (Inhabs.), and cases there cited; *Foley*, 26; 1 Bott. 79; 1 Barn. 137. *R. v. Freshford* (Churchwardens), And. 24. *R. v. Spotland* (Overseers), Cas. t. Hard. 184. See *R. v. Suffolk*, 5 N. & M. 144,† per Williams, J. See *St. Albans v. Botolph's*, 11 Mod. 206. *Butler* (Dr.) *v. Cobbett*, 11 Mod. 254, 255. *R. v. Radnor* (J.), 2 D., N. S. 676. Anon., 2 Chit. 254.

(*k*) *R. v. Wilkinton* (Churchwardens), 1 Barn. 227; and see *R. v. Lowton Parish*, 11 Mod. 301. See tit. "Act of Parliament."

(*l*) Anon., 2 Barn. 426; there being a remedy by appeal. Ante, p. 21.

(*m*) Ante, p. 21. *R. v. Woebly*, T. 19 Geo. 2, Stra. 1259; Burr. 2292; S. C. 1 W. Blac. 667, supra, n. (*j*). Com. Dig. tit. "Man." (B.).

will grant a writ to command justices to sign, and allow such a rate.(n)

—.] *Application.* See *ante*, p. 220, n. (c), and *infra*, *Form of Writ*. There should be an affidavit that the rate is necessary, or urgent.(o).

—.] *Rule.*—The rule to make a poor rate, will, if there be an affidavit of urgency, be made absolute in the first instance.(p)

—.] *Form of Writ.*—The writ to command parish officers to make a rate, must be prayed against and directed to all the parish officers, although applied for by some of them.(q)

—.] *Signing, Allowing, &c.*—The writ also lies to command justices to *sign* a poor rate, where it appears to have been properly made, and signed by the overseers, notwithstanding no churchwardens have been sworn in for a period of six years, and one of those last sworn in had died before making of the rate,(r) and although a former rate, made by part only of the parish, have been before signed; for it is not inconsistent to sign both, as thereby the right of those omitted may be contested;(s) therefore a return to such *a writ, stating that the rate is unequal, is no answer thereto;(t) but a return of the illegality [*222] of the rate will be good.(u)

The writ also lies to command justices to *allow* a poor rate regularly made.(v) Thus, where a parish contained within itself a borough, not co-extensive with it, and the mayor thereof, in his return to a mandamus for allowing a poor rate made for the whole parish, alleged a custom which had existed since stat. 43 Eliz. c. 2, to appoint separate churchwardens, &c., and to make separate rates for the borough, and for those parts of the parish which lay without the borough; it was held that such custom was

(n) *Ante*, p. 15, 18—27. R. v. Littlepoint, 6 Mod. 97. S. C. Foley, 8. S. C. 2 Salk. 531. S. C. 3 Salk. 232. S. C. Ld. Raym. 1009. S. C. 10 Mod. 104. S. C. Holt, 579. R. v. Rotherhithe, 8 Mod. 339. Com. Dig. tit. "Man." (B.) See tits. "Drainage" (Rate), "Overseer" (Reimbursement), "Rate."

(o) *Ante*, p. 15; 1 Barn. 137. See post, tit. "Application" (Affidavits).

(p) R. v. St. Andrews, 7 A. & E. 281,† and note (a). See R. v. Edlaston (Churchwardens), 1 N. & P. 20.† See tit. "Corpse," post, tit. "Rule."

(q) *Ante*, p. 220, n. (c). R. v. Edlaston (Churchwardens), 1 N. & P. 20,† n. (a), 21, n. (b); W. W. & D. 163. S. C. 1 Jur. 53, where see form of writ, citing Anon., 2 Chit. 254. See R. v. Gadsby, 1 N. & P. 572;† and R. v. Leicester there cited. See post, tits. "Application," "Writ" (Form).

(r) *Ante*, p. 12, and 220, n. (h), and *infra*, p. 222, n. (v). R. v. Godolphin (Lord), 1 D. & L. 830. S. C. 13 L. J., N. S. 57, M. C. Brendon v. Gill, 5 Mod. 275; 6 Mod. 229. Norwich's case, Comb. 478, 479. S. C. Carth. 450. Peterborough's case, 1 Sid. 377. Nottingham's case, Comb. 483. R. v. Worcester (Mayor), Cas. t. Hard. 123, n. (1) Subdeany v. Chichester (Mayor), 3 Keb. 572. S. C. 3 Keb. 594. R. v. Dorchester (J.), Stra. 393. Curser v. Smith, 1 Barn. 59. Com. Dig. tit. "Man." (A.) Bac. Abr. tit. "Man." (D.)

(s) R. v. Beecher, 8 Mod. 335; vide Carth. 450; Com. Dig. tit. "Man." (A.) See tits. "Churchwarden" (Swearing in), "Manor" (Admittance, p. 156, n. (q).)

(t) *Ante*, p. 220, n. (l). Comb. 478, *supra*. Bishopsgate v. Beecher, 8 Mod. 10.

(u) *Ante*, p. 220, n. (h). 8 Mod. 10. *Supra*, Gude Cr. Pr. 188, 189.

(v) *Ante*, p. 12. R. v. Fisher, Say. 160. R. v. Gordon, 1 B. & A. 524.

invalid; the return was quashed, and a peremptory mandamus awarded.(w)

The signature and allowance of a poor rate by justices, or those whose duty it is so to do, is, since stat. 6 & 7 Wm. 4, c. 96, a merely ministerial and not a judicial act, and may be considered a mere matter of form.(x)

— Rule.—The rule for signing and allowing a poor rate, is absolute in the first instance; because while the rule is depending, the poor may suffer; no overseer of the poor being obliged to disburse money, until he shall have obtained a rate for collecting it.(y)

—.] *Rate; Appeal against.*—The writ lies to command the Court of Quarter Sessions, or those having jurisdiction under a local act, to enter continuances and hear an appeal against a poor rate.(z) But the applicants must shew themselves strictly entitled to such mandamus.(a) The appeal may be against four poor rates, and also against an order made at the general Quarter Sessions confirming such rates.(b)

The writ also lies to command justices to enter continuances and hear an appeal against a certificate of the guardians of the poor, certifying that a certain sum was needful to be raised for the maintenance and employment of the poor, and also an appeal against a warrant of a justice, directed to [*223] certain assessors and collectors, requiring them to assess a certain sum upon certain parishioners; and to hear and determine the merits of the said appeals.(c)

—.] —. *Collecting.*—It seems that the Court has refused a writ to command the collection of a rate.(d)

—.] *Rate Books, &c.; Inspection.*—The writ does not lie to command inspection and copy of poor rate books, kept in pursuance of a local act, the Court of B. R., not being authorized by such act, or by stat. 17 Geo. 2, c. 3, or at common law to grant such inspection, &c.(e) But as a

(w) *R. v. Gordon*, 1 B. & A. 524.† See *R. v. Hollister or Folly*, 1 Bott. 78. See tits. "Custom," "Manor" (Custom).

(x) *R. v. Lord Yarborough*, 12 A. & E. 416.† S. C. 3 P. & D. 491. *R. v. Uttoxeter*, 1 Bott. 83, 305. *R. v. Hamstall (Inhabs.)*, 3 T. R. 382. *R. v. Dorchester (J.)*, Stra. 393. S. C. 1 Barn. 82. See 3 Keb. 572, 594. See tits. "Churchwarden" (Swearing in), "Office" (Officer Ministerial).

(y) *R. v. Godolphin (Lord)*, 1 D. & L. 831. S. C. 13 L. J., N. S. 57, M. C. *R. v. Fisher*, Say. 160. See tits. "Corpse," "Overseer," and post, tit. "Rule."

(z) Ante, p. 12. *R. v. Hendon (Inhabs.)*, 2 D. & R. 249.† *R. v. Essex*, 1 D. 539. *R. v. St. Peter's (J.)*, 1 N. & M. 108.† *R. v. Essex (J.)*, 5 M. & S. 513. *R. v. Sussex (J.)*, 15 East, 205. *R. v. White*, 4 T. R. 771. *R. v. London (J.)*, 15 East, 631. *R. v. Worcestersh. (J.)*, 5 M. & S. 458. *R. v. Wilts. (J.)*, 8 B. & C. 380.† S. C. 2 M. & R. 401. *R. v. Suffolk (J.)*, 6 M. & S. 57. *R. v. Herts. (J.)*, 1 N. & M. 331.† *R. v. Suffolk (J.)*, 8 D. 618. *R. v. Cambridge (J.)*, 4 N. & M. 238. S. C. 2 A. & E. 370.† *R. v. Kent (J.)*, 9 B. & C. 283.† *R. v. Middlesex (J.)*, 3 D. & L. 109. See tit. "Court Inferior" (Appeal.)

(a) Ante, p. 27, 28. *R. v. West Riding (J.)*, 4 M. & S. 327. See post, tit. "Application."

(b) *R. v. Suffolk (J.)*, 1 B. & A. 640.† See tit. post, "Writ" (Form of).

(c) *R. v. Norwich (J.)*, 3 D. & R. 43.† See tit. "Quarter Sessions" (Justices.)

(d) *R. v. Norwich (Overseers)*, Nol. 28.

(e) Ante, p. 27, 28. *R. v. St. Marylebone Vestry*, 5 A. & E. 269.† *R. v. Stamfordsh. (J.)*, 6 A. & E. 89, 90, 94.† See tits. "Accounts," "Books," "Borough,"

rated parishioner has a right to inspect, at a reasonable time, the accounts of the expenditure of the parish moneys, kept by guardians of the poor, appointed under stat. 22 Geo. 2, c. 83, so the Court of B. R. will, by mandamus, command such an inspection.(f)

—.] *Rate Books; Delivery.*—The writ lies to command an overseer of the poor to deliver over the books of the poor rates, &c. to the overseers elect, who, with the churchwardens for the time, are legally entitled to them, for they are public books, and ought to be delivered over by one overseer to another, in order that all the parishioners may have access to them.(g) If, therefore, there be a contest as to the election of overseers, that must properly appear by the return;(h) but the right of a parishioner in such a case, is a mere private right, for which the Court of B. R. will not grant the writ.(i)

—.] —. *Defaulters.*—The writ does not lie to command Commissioners of Woods and Forests to pay a poor rate in respect of lands held by them under the Crown, because either the lands are in possession of private individuals or of the Crown; if, on the one hand, they be in possession of private individuals, then a distress warrant may be obtained against them; but if, on the other hand, they be in the possession of the Crown, they are not rateable.(j) Nor does the writ lie to command an incorporated company to pay poor rates, although it have not distrainable goods, the affidavits shewing that all its goods have been fraudulently leased, and that the parish may be driven to try an action on the ground of fraud, if compelled to resort to such action.(k)

*The writ lies to command justices to summon defaulters for nonpayment of poor rates;(l) or to command such justices to [*224] hear such complaints as shall be duly laid before them, against such as have neglected to pay the poor rate, and to proceed to levy the same by distress, &c.(m) But the Court has refused to command them to issue a distress warrant to enforce the payment of poor rates, where it was doubtful whether they or the warrants were legal, and the rates were recoverable by other proceedings;(n) if, however, it be perfectly clear that the

"Company," "Corporation Municipal" (Inspection), "County," "Drainage" (Books, &c.), "Manor" (Rolls).

(f) R. v. Great Farrington (Churchwardens), 9 B. & C. 541.† R. v. Watts, 7 A. & E. 464. See tit. "Act of Parliament."

(g) Ante, p. 209, n. (w). R. v. Clapham, 1 Wils. 305. R. v. Clear, 4 B. & C. 900;† 1 Bott. 300, c. 328. Anon. 2 Barn. 326. Com. Dig. tit. "Man." (A.) See tit. "Overseers."

(h) 2 Barn. 326, supra.

(i) 4 B. & C. 901.† See tit. "Parish."

(j) Ante, p. 21. Ex parte Reeve, 5 D. 668. S. C. nom. R. v. Woods, &c. (Commissioners), W. W. & D. 264. See tits. "Crown," "Customs," "Manor" (Royal Manor), "Treasury Lords."

(k) Ante, p. 18—27. R. v. Margate Harbour, 2 Chit. 256. S. C. 3 B. & A. 220.† Bac. Abr. tit. "Man." (D.) See tits. "Company" (Execution), "Execution."

(l) Ante, p. 12. Anon., 2 Chit. 257.† See tits. "Courts Inferior," "Quarter Sessions" (Justices), "Rate."

(m) R. v. Sussex (J.), 3 N. & M. 266,† per Lord Denman, C. J., citing R. v. Benn, 6 T. R. 198, where see form of rule. R. v. Paynter, 7 Q. B. 255.† S. C. 14 L. J., N. S. 179, M. C. See tit. "Distress."

(n) Ante, p. 18—27. R. v. Hall, 4 N. & M. 546." R. v. Bucks (J.), 2 D. & R. MAY, 1852.—18

rate is due and legal, the Court cannot refuse to interfere,(o) and will, therefore, grant the writ; for as the Court will grant a mandamus to make a rate, so they will grant it for the levying thereof,(p) and notwithstanding there may have been no appeal.(q)

The defaulters must have been previously summoned by the magistrates.(r) So that the writ will be granted only where the applicant has acted legally, and fulfilled and respected all legal formulæ.(s) And it must clearly appear to the Court that the warrant will, if granted, be legal, and that the applicant has no other remedy whereby to enforce the rate;(t) but although the rate may have been made for a year, when it should only have been for a quarter, and afterwards inadvertently confirmed, the Court, on a mandamus to grant a warrant in such a case, will limit it to such quarter.(u)

*——.] *Application*.—The application for such a writ, must, [*225] however, be made promptly after the right to it has accrued.(v)

——.] *Rule*.—It is no objection to a rule for a mandamus to justices to issue their warrant of distress for the levy of poor rates, that it includes two separate and distinct rates, because the writ in such a case is divisible; and if there be any differences in the circumstances attending the rates, they may and will be separately considered, so that the rule may be made absolute as to the one, and not to the other; and even the costs may be apportioned: so that four rates may be included in one appeal, so several rates may be comprised in one mandamus.(w)

689.† S. C. 1 B. & C. 485.† Underhill v. Ellicombe, McCl. & You. 394. R. v. Bucks (J.), 3 N. & M. 68.† R. v. Middlesex (J.), 5 N. & M. 129.† per Williams, J. R. v. Middlesex, 2 Ld. Ken. 163. R. v. Cheek, 16 L. J., N. S. 65, M. C.; 1 Wils. 133; Bac. Abr. tit. "Man." (D.) But see stat. 6 & 7 Vict. c. 67, s. 3, App., which, as it provides a full indemnity for all acts properly done in execution of a writ of mandamus, so now the Court is much more liberal in its interference in doubtful cases. As to Ireland, see a similar enactment, stat. 9 & 10 Vict. c. 113, s. 8.

(o) Ante, p. 31, n. (k). R. v. Sussex (J.), 3 N. & M. 263.† St. Luke's v. Middlesex (J.), 1 Wils. 133. The stat. 6 & 7 Vict. c. 67, s. 3, App., provides a full indemnity for any act legally done in execution of a mandamus, so that the Court will, in a case of doubtful jurisdiction, with more readiness grant the writ. As to Ireland, see a similar enactment in stat. 9 & 10 Vict. c. 113, s. 8.

(p) R. v. Wilson, 5 N. & M. 119.† R. v. Ellis, 2 D., N. S. 361. R. v. Middlesex (J.), 2 D., N. S. 385. R. v. Worcestersh. (J.), 4 P. & D. 440. S. C. 10 L. J., N. S. 13, M. C. R. v. Buckinghamsh., 3 N. & M. 68.† St. Luke's case, 1 Wils. 133. R. v. Newcomb, 4 T. R. 368. R. v. Mirehouse, 2 A. & E. 637.† Hutchins v. Chambers, Burr. 579, 587; and see 2 A. & E. 618,† n. (a), and 8 Mod. 10; Stra. 992; Com. Dig. tit. "Man." (A.) R. v. Benn, 6 T. R. 198; 7 T. R. 270. R. v. Hughes, 3 A. & E. 425.† S. C. 5 N. & M. 94.† See tits. "Court Inferior" (Judgment, Execution), "Execution," "Quarter Sessions" (Justices).

(q) R. v. Morgan, &c., 2 A. & E. 618,† n. (a). See ante, p. 21.

(r) R. v. Benn, 6 T. R. 198. But see Const's Bott. 207, pl. 208. R. v. Hughes, 3 A. & E. 427.† See also 1 Wils. 133, supra. Com. Dig. tit. "Man." (A.) See supra, n. (b), and tit. "Rate."

(s) Ante, p. 27, 28; 3 A. & E. 428,† supra.

(t) Ante, p. 18—27. R. v. Hall, 1 Har. & W. 83. See tits. "Quarter Sessions" (Justices), "Rate."

(u) Bishopsgate v. Beecher, 8 Mod. 10. And see ante, p. 280, n. (g), (h).

(v) R. v. Ellis, 2 D., N. S. 361. See tit. "Application" post, (When to be made).

(w) R. v. Ellis, 2 D., N. S. 361. S. C. 12 L. J., N. S. 96, Q. B.; M. C. 20. R. v.

—.] *Reimbursement*.—The writ lies to command the Quarter Sessions to hear an application under stat. 41 Geo. 3, c. 23, s. 8, and to order the repayment of a sum of money overcharged in a poor rate, if there exists no other remedy.(c)

—.] *Poor Law Commissioners*.—The writ lies to command guardians of the poor of a parish to obey a certain order under the hands and seals of the Poor Law Commissioners; but not where such parish is exempted by its local act.(y) So it lies to command such guardians to pay money collected for the relief of the poor, under an order of the Poor Law Commissioners, to a board of guardians of an union, described in that order as duly appointed.(z) And to such a writ, a return generally that the defendants are not guardians, is bad.(zz)

POOR LAW COMMISSIONERS.] See titles *Guardians of the Poor*; *Poor* (*Poor Law Commissioners*).

POOR RATE.] See titles *Parish (Rate)*; *Poor (Rate)*; *Rate*.

PORTREEVE.] *Election*; *Swearing in*, &c.—The writ lies to command the holding of a Court, the impanelling and swearing of a jury, and the charging of them to elect and swear some person to the office of a portreeve.(a) So the writ also lies to command the lord of a Court Leet to administer the usual oath to a portreeve, duly elected.(b)

*—.] *Insignia*.—As to the delivery up of insignia by portreeve.(c) [*226]

PREBENDARY.] *Election*.—The writ lies to command the election of a prebendary.(d)

The writ lies also to command the election of a prebendary to be a

Suffolk (J.), 1 B. & Ald. 640. See supra, tit. "Rate" (Appeal), p. 222, n. (b), and post, tits. "Rule," "Writ" (Mandatory Clause).

(x) R. v. St. Peter's (J.), 1 N. & M. 108.† S. C. 4 B. & Ad. 342.† See tits. "Constable, High" (Reimbursement by), "Drainage" (Reimbursement), "Overseers" (Rate).

(y) R. v. Poor Commissioners, 1 N. & P. 371.† S. C. 6 A. & E. 1.† R. v. St. Andrew's Parish, 13 L. J., N. S. 341, Q. B. See tit. "Guardians of the Poor."

(z) R. v. St. Andrew's, Holborn, 10 A. & E. 738.† See tit. "Money."

(zz) Note (z), supra. See tit. "Return."

(a) R. v. Williams, Say. 140. As to the derivation of the word "Portreeve," and the nature of the office, see Blount's Law Dict., and Tomlin's Law Dict., tit. "Portreeve." As to returns, see tit. "Office." Stat. 9 Ann. c. 20, App. See tit. "Ale-taster," "Court Inferior," "Mayor," "Manor" (Leet), "Office" (Election, &c.)

(b) Phillipp's case, 2 Roll. 82, 85; also cited in Com. Dig. tit. "Man." (A). See tits. College" (Oaths), "Manor" (Leet), "Resiant," "Oath of Allegiance."

(c) R. v. Jennings, 2 Jur. 179; and tits. "Company," "Corporation" (Municipal), "Insignia," "Seal."

(d) Stra. 1082. S. C. Andr. 20. Chester (Ep.) v. Harward, 1 T. R. 652; Com. Dig. tit. "Man." (A); Andr. 21. R. v. Rochester (Dean), 1 Barn. 40. S. P. R. v. Norwich (Dean), Stra. 159. R. v. Dublin (Dean), Stra. 536. Bac. Abr. tit. "Man." C. 1, 2. See tits. "Canon," "Office" (Election).

canon residentiary, in order to his qualification for dean, if quare impedit do not lie.(e)

——.] *Institution, &c.*—The writ also lies to institute and induct into and invest of a prebend.(f) But the writ does not lie if the applicant claim under a custom which is ridiculous and void, as a custom to be appointed a supernumerary prebendary.(g) Nor will it lie for that which is the subject of quare impedit.(h)

——.] *Installation.*—The writ lies to command installation into a prebend, it being but a ministerial act.(i) Thus, it has been granted to command the installation of the provost of a college into a prebend annexed to such provostship by charter, confirmed by act of Parliament.

——.] *Swear in.*—The writ lies also to command the swearing in of a prebendary,(j) and this although he do not require installation. Thus, the Archdeacon of Rochester, when instituted and inducted into that office, is ipso facto inducted into the prebend annexed to it by royal grant, and may therefore claim to be sworn as a prebendary without being installed.

——.] *Admission.*—The writ lies also to command the admission of a prebendary, but to such a writ a return of non fuit electus is good.(k)

The writ lies also to command the admission of a prebendary to his *stall and voice*. A prebend is a freehold office, and installation, which is the act to be done to complete the admission, is a merely ministerial duty.(l)

[*227] In *some of the cases in which the Court has thus granted the writ there was no return of "*Visitor*," in others, the prebend was created by act of Parliament, and so made a sort of lay fee.(m)

(e) Ante, p. 26. R. v. St. Peter's 12 A. & E. 512.† S. C. 4 P. & D. 253. See tit. "Canon" (Residentiary).

(f) Clark v. Sarum (Ep.), Stra. 1082. S. C. Andr. 20; 185. Com. Dig. tit. "Man." (A.), cited in R. v. Dublin (Dean), 8 Mod. 28. R. v. Dr. Bland, 7 Mod. 355. See tits. "Canon," "Parson."

(g) Ante, p. 113, n. (g). Dr. Owen's Case, Skin. 45. S. C. Jones, 199. S. C. 2 Show. 209, n. (a), 3rd edit., nom. R. v. Stenhouse. See tits. "Canon," "Curate," "Custom," "Manor" (Custom, License).

(h) Ante, p. 26. Clarke v. Sarum (Ep.), Stra. 1081, n. (1), 3rd edit. Powell v. Millbank, 1 T. R. 399. R. v. Chester (Ep.), 1 T. R. 396. R. v. St. Peter's, 12 A. & E. 512.† S. C. 4 P. & D. 253.

(i) R. v. Rochester (Dean), 1 Barn. 40. Dr. Sherlock's case, cited in R. v. Dr. Ward, 1 Barn. 112, and in 1 Wils. 208, and in R. v. Chester (Ep.). 1 W. Blac. 24. R. v. Salisbury (Ep.), Andr. 20. See tits. "Bishop," "Canon," "Cathedral Stall," "Curate," "Dean," "Parson," and infra, "Admission."

(j) R. v. Rochester (Dean), 3 B. & Ad. 95.† R. v. Baylay, 1 B. & Ad. 761.† See tit. "Office" (Swearing in).

(k) R. v. Lambert, 1 Sid. 209, 210. S. C. 12 Mod. 3; Gude's Cr. Pr. 200. See tit. "Office" (Admission, Return non fuit electus).

(l) Dr. Owen's case, Skin. 45. S. C. Jones, 199. There are express precedents in Register, 303, also stated in R. v. Patrick, 2 Keb. 171, per Keeling, C. J. R. v. Stenhouse, 2 Show. 209, n. (a), 3rd edit. R. v. Chester (Ep.), 1 Wils. 206. R. v. Norwich (Dean), Stra. 158. S. C. Fort. 222, cited in 2 Bac. Abr. 532; Andr. 21. R. v. Rochester (Dean), 1 Barn. 40. Com. Dig. tit. "Man." D. 4. R. v. Dublin (Dean), &c., Stra. 536; Stra. 1082. R. v. Salisbury (Ep.), cited in R. v. London (Ep.), 1 Wils. 13. R. v. St. Peter's, 12 A. & E. 512.† See tit. "Cathedral Stall," "Churchwarden."

(m) Ante, p. 11. R. v. Chester (Ep.), 1 Wils. 203; Stra. 159. See tits. "Act of Parliament," "College" (Visitor), "Visitor."

—[*Restoration*.—The writ does not lie to command a visitor to restore a prebendary whom he has deprived, for a visitor has an absolute power within his jurisdiction.(n)

PRECEDENCE.] Loss of precedence or authority, as that of alderman of a city, is a sufficient ground for a writ of mandamus.(o)

PRESENTMENT.] The writ will not be granted to command the presentment of a fact upon oath, unless the existence of such fact be quite evident.(p)

But the writ lies to command justices to redress a grievance shown upon a presentment by a magistrate whose duty it is to present it to them.(q)

PRIOR.] The writ of mandamus has never been granted for a prior, because he was an ecclesiastical corporation, and had a proper visitor, which duty afterwards devolved upon the archbishop.(r)

PRESIDENT OF COLLEGE.] See titles *College (President)*; *Office*; *Visitor*.

PRINCIPAL BURGESS.] See titles *Burgess (Principal)*; *Office*.

PRISONER.] *Prison*.—The writ will be granted to command the governor or gaoler of a prison or house of correction to receive a prisoner for debt, duly committed to his prison;(s) but the Court will not grant the writ to command justices to order prisoners committed to gaol for *trial, any other food than bread and water, where such prisoners [*228] are able to work, and have the means of employment offered to them, by which they may earn their support, if they choose to work.(t) The writ has, however, been granted, under stat. 5 & 6 Vict. c. 22, (for regulating

(n) Ante, p. 10. R. v. Chester (Ep.), 2 H. 21 Geo. 2, 1 Wils. 206. Com. Dig. tit. "Man." (B.) S. C. 1 W. Blac. 21. Phillips v. Bury, Ld. Raym. 5. S. C. 2 T. R. 346. S. C. Skin. 447, 475. S. C. Show. P. C. 35. See tit. "Visitor."

(o) R. v. Oxford (Mayor), Latch, 231, per Doderidge, J., and Hyde, C. J. See tits. "Alderman" (Restoration), "Corporation Municipal," "Mayor," "Office" (Restoration).

(p) R. v. Montacute, 1 W. Blac. 60. S. C. 1 Wils. 283. See tits. "Custom," "Freeman" (Presentment), "Gaol," "Highway" (Presentment), "Inquest," "Jury," "Manor" (Lect), (Baron), "Nuisance."

(q) Ante, p. 12. R. v. North Riding (J.), 2 B. & C. 286.† S. C. 3 D. & R. 510;† and see 2 B. & C. 341.† See tit. "Gaol."

(r) See Mr. Leigh's case, 3 Mod. 334. S. C. nom. R. v. Lee, &c., 1 Show. 252, per Holt, C. J. Dr. Witherington v. Christ's Coll., 1 Sid. 71. See tits. "Abbot," "Knight Templar," "Monk," "Office," "Visitor."

(s) Ante, p. 12. R. v. H. of Correction (Govr.), 2 N. & M. 138.† See tit. "Gaol," "Nuisance" (Removal).

(t) Ante, p. 12. R. v. North Riding (J.), 3 D. & R. 510.† S. C. 2 B. & C. 286.† See tits. "Act of Parliament," "Gaol."

the Queen's Prison), to command the keeper of such prison to make allowances to a prisoner out of certain funds in the act specified.(u)

—.] *Depositions.*—The writ lies, under stat. 6 & 7 Wm. 4, c. 114, s. 3, to command the delivery to a prisoner or his attorney of copies of the examinations of witnesses, upon whose depositions he had been from time to time and finally stands committed.(v) As, however, a prisoner, when committed to prison for further examination merely, and not finally for trial, has no right to copies of the depositions under such statute, so a mandamus for that purpose will be denied.(w)

The writ does not lie to command a magistrate to produce depositions taken before him on a charge of felony, for the purpose of founding an indictment; the proceeding to be taken in such case being, to *subpœna* the magistrate to produce the depositions.(x)

PRIVATE INSTITUTIONS.]—See titles *Charity; Institutions Private.*

PRIVY COUNCIL, THE JUDICIAL COMMITTEE OF.] *Rehearing.*—The writ does not command the judicial committee of the privy council to rehear the matter of an appeal to them from the Arches Court of Canterbury, or from any other Court, and upon which they have decided, nor can they be required to receive a petition to her Majesty in council to rehear, there being no distinction in substance between a mandamus to receive a petition to rehear, and a mandamus to rehear.(y) Nor will the writ be granted for such purpose, although there be a suggestion of error in the decision; for when a Court of competent jurisdiction has decided a case, the Court of B. R. has no jurisdiction.(z)

PROCTOR.] As a proctor is not a temporal officer, but a spiritual one, [*229] *and so under the sole control of the Ecclesiastical Courts, which have an original jurisdiction and cognizance over their own officers exclusive of the Courts of Law; therefore, the Court of B. R., where the writ of mandamus must be prayed, cannot take notice of his office, viz.,

(u) Ante, p. 11. In re Long, 14 L. J., N. S. 23, Q. B. The rule for the peremptory mandamus was made absolute in the first instance; but the writ was afterwards quashed on the merits of the case. 14 L. J., N. S. 146, Q. B. See tit. "Act of Parliament."

(v) R. v. London (Mayor), 1 D. & M. 484. S. C. 5 Q. B. 555.† S. C. 13 L. J., N. S. 67, M. C. S. C. 1 D. & L. 896, nom. Ex parte Fletcher. See tits. "Courts Inferior" (Records), "Prisoner."

(w) Ante, p. 27, 28, supra, n. (b). See tits. "Act of Parliament," "Depositions."

(x) Ante, p. 20. In re Bedford (J.), 1 Chit. 627, Abbott, C. J., saying there was no precedent for such an application. R. v. Smith, Stra. 126. Welsh v. Richards, Barnes, 468. See tit. "Depositions."

(y) Ex parte Smyth, 4 N. & M. 582.† S. C. 3 A. & E. 719.† S. C. 1 H. & W. 417. Ex parte Morgan, 2 Chit. 250. Ex parte Poe, 2 N. & M. 636;† 5 N. & M. 145;† 1 H. & W. 282. See tits. "Courts Inferior" (Rehearing), "Courts Inferior" (Judicial Committee of Privy Council), "Quarter Sessions" (Rehearing, Review).

(z) Ante, p. 110, n. (e); 4 N. & M. 582.† S. C. 3 A. & E. 719.† See tit. "Quarter Sessions" (Hearing).

what are his duties, or what estate he has in his office, whether for life or otherwise.(a)

A mandamus, therefore, does not lie in either to admit or to restore to the office of a proctor in Doctors' Commons,(b) because, it is not only not such a public office for which a mandamus will lie, but also it is an Ecclesiastical employment, and a matter properly and solely cognizable in an Ecclesiastical Court,(c) and therefore, one of which the common law cannot take notice.(d) The Court Ecclesiastical has no other way of punishing a proctor than by displacing him, and if this should be remedied by a mandamus, then such an officer might offend without punishment.(e)

PROVOST OF COLLEGE.] See titles *College (Provost)*; *Seal*; *Prebendary (Installation)*; *Eton College*; *Provost of Eton*.

PROVOST OF ETON.] See titles *College (Provost)*; *Eton (Provost of)*.

QUARTER SESSIONS, COURT OF.] As to the general jurisdiction of the Court of B. R. over the Court of Quarter Sessions, see titles *Courts (Inferior)*; *Manor (Leet)*.

This subject is arranged as follows :—1st. Quarter Sessions; 2nd. Petty Sessions, Justices.

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*1st. QUARTER SESSIONS.] *Complaint*.—If justices at Quarter Sessions refuse to entertain a complaint, &c., under an erroneous supposition that they have no jurisdiction to hear it, or if the hearing be

(a) Ante, p. 108, n. (m); 1 Roll. Abr. 526. See tit. "Office" (Office of Court).

(b) R. v. Oxenden, 1 Show. 217. S. C. (as to return, &c.), 1 Show. 251, nom. R. v. Lee. S. C. (as to second argument with judgment), 1 Show. 261. S. C. 3 Lev. 309 (nom. R. v. Lee). S. C. Holt, 435. S. C. 3 Mod. 332 (nom. Mr. Leigh's case). S. C. Carth. 169. S. C. Skin. 290. S. C. 3 Salk. 230. See R. v. Raines, 3 Salk. 233, 11, 13. See R. v. Morpeth (Bailiffs), Stra. 58. See Clerk v. Lee, 10 Mod. 262; Ld. Raym. 959, 989, 1004, 1206, 1244, 1267, 1379, 1405; 1 Roll. Abr. 526; Com. Dig. tit. "Man." B. See R. v. Dr. Ward, 1 Barn. 295, 381. R. v. Canterbury (Archbishop), 8 East, 216; Bac. Abr. tit. "Man." C.

(c) Ante, p. 108, n. (m). Leigh's case, Carth. 170. R. v. Lee, 3 Lev. 309; Trem. Pl. Cor. 489, 491, 493, where see form of writ. See tits. "Courts Superior" (Common Pleas), "Office" (Officers of Courts).

(d) Lee v. Dr. Oxenden, Skin. 290.

(e) 3 Mod. 334, supra; Carth. 169, supra; 3 Lev. 309, supra; Skin. 290, supra. See 1 Show. 252, n. (d).

illusory; the Court of B. R. will grant the writ, and thereby command them to do their duty in order to prevent a defect of justice. *(f)* But if such justices hear the complaint, and decide erroneously, such judicial decision being one purely discretionary, the Court of B. R. cannot interfere; *(g)* for such Court has no power to command the sessions to come to a particular decision, as to make an order of maintenance on a particular parish. *(h)* Nor does the writ lie to compel obedience to an order of sessions. *(i)*

—.] *Return*.—A return, that the complaint has been heard and determined, is good. *(j)*

—.] *Rehearing*.—It is the ordinary practice of the Court of B. R., to grant the writ of mandamus, to command magistrates or the Quarter Sessions to hear and determine or give judgment in cases within their jurisdiction, where they have refused altogether to exercise it, but no instance can be cited in which the Court of B. R. has granted a mandamus to compel them to do a specific act, as to come to any particular decision; *(k)* for, after they have once decided an appeal, &c., even erroneously, or under a mistake of law, such decision is final and conclusive. *(l)* Also if the Quarter Sessions should hear one side, and altogether refuse to hear the other, the Court would consider such conduct as tantamount to a refusal to hear, and grant a mandamus: but where the question is one peculiarly within the jurisdiction of the Quarter Sessions, as to the practice of the sessions, &c., the Court of B. R. has no jurisdiction to interfere. *(m)* So, where the Quarter Sessions on appeal, decide on a point preliminary to the whole case, or to the reception of a particular piece of evidence, that they will not hear the cause further, their *decision [*231] is conclusive, if the point involve matter of fact only, but otherwise, if it raise a mere point of practice, which the Court of B. R., can

(f) Ante, p. 9, 11. *R. v. Cumberland (J.)*, 1 M. & S. 192, 194. *R. v. Kent (J.)*, 14 East, 395. *R. v. Cumberland (J.)*, 4 A. & E. 695.† *R. v. Tod*, Stra. 530. *R. v. Jukes*, 8 T. R. 625. See tit. "Courts Inferior" (Plaint).

(g) See supra, n. *(f)*, and ante, p. 12—15.

(h) *R. v. Middx.*, 4 B. & A. 298,† ante, p. 218, n. *(t)*, and infra, n. *(k)*.

(i) *R. v. Bristow*, 6 T. R. 168; Bac. Abr. tit. "Man." (D.) See tits. "Courts Inferior" (Judgment and Execution), "Execution." See ante, p. 35, n. *(y)*.

(j) Ante, p. 109, n. *(c)*. *R. v. Richardson*, 1 Wils. 21. See post, tit. "Return."

(k) Ante, p. 218, n. *(t)*. *R. v. Suffolk (J.)*, 5 N. & M. 141.† S. C. 3 A. & E. 725.† See tits. "Certiorari," "Court Inferior" (Hearing), "Inquest." See post, tit. "Writ" (Mandatory Clause).

(l) Ante, p. 12—15, 109, n. *(c)*. See tit. "Courts Inferior" (Judgment, &c.); 7 D. & R. 234.† S. C. 4 B. & C. 849,† supra. *R. v. Cumberland (J.)*, 1 M. & S. 194. *R. v. Leicestersh. (J.)*, 1 M. & S. 442. *R. v. Westmoreland (J.)*, M. T., 23 Geo. 2; Bott. 734, 3rd edit. *Bodmin v. Warlingham*, Bott. 733. *R. v. Chesh. (J.)*, 8 A. & E. 399, 401.† *R. v. Monmouthsh. (J.)*, 8 B. & C. 138.† *R. v. West Riding (J.)*, 11 L. J., N. S. 57, M. C.; Bac. Abr. tit. "Man." (D.)

(m) See infra, "Appeal," and ante, p. 119, n. *(f)*. *R. v. Carnarvon (J.)*, 4 B. & A. 88,† per Holroyd, J. *R. v. Gloucestersh. (J.)*, 1 B. & Ad. 1,† and see 5 B. & Ad. 597.† *R. v. — (J.)*, 1 Chit. 164. *In re Pratt*, 7 A. & E. 28. S. C. 2 N. & P. 102. *R. v. Cumberland (J.)*, 4 A. & E. 698.† See tits. "Courts Inferior" (Rehearing).

perceive to be a point of law, in the latter case a mandamus to hear, &c., will be granted, in the former not.(*n*) But it is no ground for granting the writ, that the Quarter Sessions have refused to hear useless and irrelevant matter, which ought not to affect the judgment.(*o*)

The Court of B. R. has no jurisdiction to interfere with the decision of the Quarter Sessions, where it is final and conclusive, and a certiorari is taken away, for such Court will not by mandamus do that indirectly which it is prohibited from doing directly.(*p*) Neither will such Court grant the writ if the result, at which the Quarter Sessions has ultimately arrived be right, for the reasons of the judgment cannot be inquired into.(*q*) Nor if they have exercised a discretion in a matter over which they have a discretionary power.(*r*) Nor where they, upon having doubts as to the validity of the order, upon which the appeal is sought, superseded it.(*s*) Nor where the inquiry can lead to no good result,(*t*) nor for the purpose of calling in question in a spiritual Court the decision of another such Court of very high authority, which in the exercise of a similar jurisdiction, proclaims the illegality of the very thing of which the execution is desired.(*u*)

—.] *Appeal*.—If the Court of Quarter Sessions after demand made, improperly refuse to go into an appeal, the Court of B. R. will compel them so to do by writ of mandamus.(*v*) So the writ will lie where the hearing, &c., is illusory.(*w*) The demand to hear, must however, have been made at a time when the Sessions ought in due course to have heard and determined the *appeal,(*x*) and a right to have the appeal heard,

(*n*) *R. v. Kesteven (J.)*, 3 Q. B. 810. S. C. 1 D. & M. 113, distinguishing *R. v. Carnarvonsh. (J.)*, 2 Q. B. 325.† S. C. 1 G. & D. 423, which to some extent is erroneous, and the case of *R. v. West Riding (J.)*, 2 Q. B. 331,† which is still more erroneous. *R. v. Frieston (Inhab.)*, 5 B. & Ad. 597,† and 1 B. & Ad. 1.† *R. v. Cambridgesh. (J.)*, 1 D. & R. 325.† *R. v. Tucker*, 5 D. & R. 441. In *re Pratt*, 7 A. & E. 27, and see 1 Q. B. 630.† S. C. 1 G. & D. 198. *R. v. Carnarvonsh. (J.)*, 4 B. & A. 86.† *R. v. Leicestersh. (J.)*, 1 M. & S. 412; Bac. Abr. tit. "Man." (D.) See post, 234, n. (*k*).

(*o*) *R. v. West Riding (J.)*, 5 B. & Ad. 1010.† *R. v. Minshall*, 1 N. & M. 277.†

(*p*) *R. v. West Riding (J.)*, 5 B. & Ad. 1008.† See tit. "Certiorari."

(*q*) Ante, p. 10. *R. v. West Riding (J.)*, 1 G. & D. 630. S. C. 2 Q. B. 705.†

(*r*) Ante, p. 12—15. *R. v. Norfolk (J.)*, 1 D. & R. 69, 74.† See tit. "Discretion."

(*s*) 1 D. & R. 74, supra. But see stat. 6 & 7 Viet. c. 67, s. 3, App.; and as to Ireland, see stat. 9 & 10 Vict. c. 113, s. 8, App., and infra, "Warrant."

(*t*) Ante, p. 15, 16. *R. v. Northwich Savings' Bank*, 9 A. & E. 729.† See S. C. 1 P. & D. 477. *R. v. Shortridge*, 1 D. & L. 863. *R. v. Sillifant*, 5 N. & M. 642,† n. (*g*). *R. v. Milverton (Manor)*, 3 A. & E. 285.†

(*u*) *R. v. Thomas*, 3 G. & D. 490. S. C. 3 Q. B. 589.† See tit. "Courts Superior."

(*v*) Ante, p. 12. See post, tit. "Application" (Demand and Refusal). *R. v. Cambridge (J.)*, 2 A. & E. 370.† S. C. 4 N. & M. 238.† *R. v. Westmoreland (J.)*, Say. 282. *R. v. Worcestersh. (J.)*, 9 D. & R. 210.† Bac. Abr. tit. "Man." (D.) See tits. "Conviction" (Appeal), "Court Inferior" (Appeal), "Poor" (Appeal).

(*w*) Ante, *R. v. Kent (J.)*, 14 East, 395. *R. v. Cumberland (J.)*, 1 M. & S. 194. See supra, "Hearing."

(*x*) *R. v. Kent (J.)*, 9 B. & C. 283, 285.† See post, tit. "Application" (Demand and Refusal), (When to be made).

[*232] must of course exist at the time of the application for the writ, (y) otherwise it will be refused. (z)

The writ lies to command the Court of Quarter Sessions or a recorder to enter any appeal, which they ought to hear; or enter continuances, and hear and determine the merits of such an appeal, and also if the facts of the case warrant it, to take the recognizance of the applicant and his sureties for trying the appeal, and thereupon forthwith to discharge him out of custody. (a) The Court may make absolute a rule nisi for a mandamus to hear an appeal upon certain specific grounds as upon the first, second, fifth, and sixth grounds of appeal. (b)

The Court of B. R. has repeatedly held, that it is not precluded from inquiring whether the Quarter Sessions have decided rightly upon any preliminary point necessary to determine their own jurisdiction; (c) and where the Sessions dismiss an appeal on a preliminary point, and at the same time tender the appellants a case which they decline to accept, the [*233] appellants are not thereby precluded from applying for a mandamus to enter continuances *to hear it. (d) The Court of B. R. will always interpose against any illegal practice of sessions, whereby the

(y) 1 East, 683, 686; 1 M. & S. 479; 4 M. & S. 327; 1 B. & A. 210; † 4 B. & C. 62; † 7 B. & C. 691. † R. v. Surrey (J.), 2 T. R. 504. R. v. Skone, 6 East, 514. R. v. West Riding (J.), 1 Q. B. 624. † S. C. 1 G. & D. 198. S. C. 11 L. J., N. S. 85, M. C. R. v. Derbysh. (J.), 1 D. 386. R. v. Derbysh. (J.), Nol. 29. R. v. Lancash. (J.), 12 L. J., N. S. 110, M. C.; Bac. Abr. tit. "Man." (D.) R. v. West Riding (J.), 16 L. J., N. S. 171, M. C., post, c. 234, n. (u). (p).

(z) R. v. Devon (J.), 4 M. & S. 422. R. v. Durham (J.), 16 L. J., N. S. 112, M. C., post, p. 234, n. (a).

(a) Ante, p. 12. R. v. Newcastle (J.), 1 B. & Ad. 933. † In re Pratt, 7 A. & E. 27. † R. v. Chesh. (J.), 8 A. & E. 399. † R. v. West Riding (J.), 1 G. & D. 198. S. C. 1 Q. B. 630. † R. v. Carmarthen (Recorder), 7 A. & E. 756. † R. v. Westmoreland (J.), Say. 282. R. v. Surrey (J.), 2 T. R. 504. R. v. Chesh. (J.), 5 B. & Ad. 439. † R. v. Tucker, 3 B. & C. 545. † Ex parte Ackwork (Overseers), 3 Q. B. 397. † R. v. Somerset (J.), 4 B. & C. 913. † R. v. Devon (J.), 1 M. & S. 410. R. v. Monmouthsh. (J.), 8 B. & C. 138. † R. v. Monmouthsh. (J.), 4 B. & C. 846. † R. v. Cheltenham (Commissioners), 1 Q. B. 473. † R. v. York (J.), 2 B. & C. 771. † R. v. Monmouthsh. (J.), 1 B. & Ad. 897. † R. v. Cartworth (Inhabs.), 1 D. & L. 844. R. v. Chesh. (J.), 11 A. & E. 139. † R. v. West Riding (J.), 1 A. & E. 606. † R. v. Bedfordsh. (J.), 11 A. & E. 134. † R. v. Middlesex (J.), 11 A. & E. 809. † R. v. Suffolk (J.), 6 A. & E. 109. † S. C. 1 N. & P. 306. † R. v. Frieston (Inhabs.), 5 B. & Ad. 597. † R. v. West Riding (J.), 5 B. & Ad. 1003. † R. v. Norfolk (J.), 5 B. & Ad. 590. † R. v. Dorsetsh. (J.), 15 East, 200. R. v. Sussex (J.), 15 East, 200. R. v. London (Mayor), 15 East, 632. R. v. Gloucestersh. (J.), 1 B. & Ad. 1. † R. v. Middlesex (J.), 16 East, 310. R. v. Lancash. (J.), 7 B. & C. 691. † R. v. Essex, 2 Chit. 385; † 1 N. & M. 426; † 2 N. & M. 390; † 3 N. & M. 59. † See tit. "Poor" (Removal, Appeal).

(b) Ante, p. 225, n. (w). R. v. Suffolk (J.), 1 B. & A. 640. † See post, tits. "Rule" (Absolute), "Writ" (Mandatory Clause).

(c) See supra, "Hearing." R. v. West Riding (J.), 3 P. & D. 462. R. v. Staffordsh. (J.), 4 A. & E. 842. † S. C. 6 N. & M. 477. † R. v. West Riding, 5 B. & Ad. 667. † S. C. 2 N. & M. 390. † See 1 G. & D. 635. Ex parte Pontefract (Churchwardens), 3 G. & D. 191. R. v. Carnarvonsh. (J.), 11 L. J., N. S. 3, M. C. R. v. Surrey (J.), 15 L. J., N. S. 46, M. C. S. C. 3 D. & L. 573. R. v. Kent (J.), 14 East, 395. R. v. Cumberland (J.), 1 M. & S. 190. Bac. Abr. tit. "Man." (D.) See tit. "Courts Inferior," and ante, p. 11.

(d) Ante, p. 21, and post, p. 235. R. v. West Riding (J.), 11 L. J., N. S. 84, M. C.

hearing of an appeal is prevented(*e*), but the Court will not interfere with such practice, unless it appear to have been manifestly wrong or unjust.(*f*) Thus, the Court will command the Quarter Sessions to hear an appeal which has been dismissed for noncompliance with the rule laid down by them as to giving notice of appeal, if it think that justice will be most satisfactorily administered by so doing, for although the Quarter Sessions has a discretionary power to make rules for the governance of its practice, yet the Court of B. R. will, for the purposes of justice, interfere and control that discretion.(*g*)

The appeal must, however, be duly entered, and every necessary step taken, otherwise the Court will not, by mandamus, command it to be heard.(*h*)

The sufficiency of grounds of appeal in point of particularity of statement is a question for the Sessions, and where they have come to a decision upon the point, the Court will not grant a mandamus to enter continuances and hear the appeal.(*i*) So, if the Quarter Sessions have decided a question of fact proper for their decision, the Court will not grant a mandamus to hear the appeal.(*j*)

*If, however, the sessions dismiss an appeal upon a point of law which they have wrongly decided, the Court will set them right, [*234] and command them to enter and hear the appeal.(*k*)

(*e*) Ante, p. 231; 5 B. & Ad. 667.† S. C. 2 N. & M. 390;† 3 G. & D. 191, supra. R. v. Wiltsh. (J.), 4 M. & R. 401. S. C. 8 B. & C. 380.† R. v. Suffolk (J.), 4 Jur. 390. R. v. Norfolk (J.), 5 B. & Ad. 990.† S. C. 3 N. & M. 55.†

(*f*) Ante, p. 230, 231, R. v. Wiltshire (J.), 10 East, 404. R. v. Essex (J.), 2 Chit. 385.† R. v. Suffolk (J.), 6 M. & S. 58. R. v. Warwicksh. (J.), 6 Q. B. 751.† S. C. 14 L. J., N. S., 39, M. C. The affidavits should state the practice by annexing the rules, or otherwise. R. v. Montgomerysh. (J.), 3 D. & L. 119. Bac. Abr. tit. "Man." (D.)

(*g*) Ante, p. 12—15. R. v. Wiltsh. (J.), 10 East, 404. R. v. Lancash. (J.), 7 B. & C. 692.† R. v. West Riding (J.), 1 N. & M. 431.† R. v. Derbysh. (J.), 6 A. & E. 885.† S. C. 1 N. & P. 148,† n. (*a*). R. v. West Riding (J.), 4 B. & Ad. 688.† R. v. West Riding (J.), 1 A. & E. 606.† S. C. 3 N. & M. 757.† R. v. Norfolk (J.), 5 B. & Ad. 990.† R. v. Oxfordsh. (J.), 3 G. & D. 348. S. C. 4 Q. B. 177.† S. C. 12 L. J., N. S. 40 M. C. R. v. Denbysh. (J.), 9 D. 509; 5 Jur. 99. R. v. Cornwall (J.), 5 A. & E. 134.† S. C. 1 N. & P. 144.† S. C. 2 H. & W. 157. R. v. Bedfordsh. (J.), 9 L. J. R., N. S., 3, M. C. R. v. Chesh. (J.), 9 L. J., N. S. 89, M. C. R. v. West Riding, (J.), 13 L. J., N. S. 39, M. C. R. v. Middlesex (J.), 14 L. J., N. S. 139, M. C. See R. v. Montgomery (J.), 3 D. & L. 119. S. C. 14 L. J., N. S. 142, Q. B. R. v. Surrey (J.), 15 L. J., N. S. 46, M. C. S. C. 3 D. & L. 573. R. v. London (J.), 15 L. J., N. S. 127, M. C. R. v. West Riding (J.), 3 D. & L. 152. R. v. Middlesex (J.), 3 D. & L. 745. R. v. Suffolk (J.), 16 L. J., N. S., 36, M. C. See tit. "Discretion."

(*h*) Ante, p. 27, 28. R. v. Salop (J.), 4 B. & A. 626.† R. v. Middlesex (J.), 9 L. J., N. S. 59, M. C. Supra, p. 231, 232.

(*i*) R. v. Kesteven (J.), 1 D. & M. 113. S. C. 3 Q. B. 810.† S. C. 13 L. J., N. S., 78 M. C. R. v. Caernarvon (J.), 1 G. & D. 423. S. C. 11 L. J., N. S. 3 M. C. R. v. Derbysh. (J.), 1 N. & P. 703,† S. C. W. W. & D. 248. R. v. Sussex (J.), 9 L. J., N. S. 22, M. C. R. v. Staffordsh. (J.), 12 L. J., N. S. 9 M. C. R. v. Surrey (J.), 13 L. J., N. S. 86, M. C. R. v. Staffordsh. (J.), 16 L. J., N. S. 53 M. C. R. v. Somersetsh. (J.), 16 L. J., N. S. 86, M. C. Bac. Abr. tit. "Man." (D.) R. v. Monmouthsh. (J.), 4 B. & C. 844; and R. v. Worcestersh. (J.), 1 Chit. 649.

(*j*) Ante, p. 230, 231. R. v. Flintsh. (J.), 16 L. J., N. S. 55, M. C. See supra. "Hearing," "Courts Inferior," (Hearing).

(*k*) Ante p. 231, n. (*u*). R. v. Somersetsh. (J.), 16 L. J., N. S. 86, M. C.

The writ does not lie to command the dismissal of an appeal pending at Quarter Session.(l)

The Court of B. R. will, in some cases, suspend the issuing of a mandamus in order to give time to an appeal, but not if they entertain no doubt upon the point proposed for their consideration.(m)

— *Application*.—The application of the Court of B. R. must be made within a reasonable time after the right has accrued, or the refusal has been made,(n) or the writ will be refused. It is a rule of practice, that a writ for the above purpose must be applied for promptly and speedily after the sessions at which it should have been heard; in general it should be made during the term in which, or that next following the time the appeal was refused or dismissed,(o) or the Court will not entertain the application; but under special circumstances the Court will entertain it even after that period.(p)

Only those magistrates who at Sessions take part in a decision should be brought before the Court of B. R. on an application for the writ; therefore, those who, though present, do not take part should not be brought before the Court, if so, the rule will be discharged with costs, notwithstanding it may not clearly appear whether the prosecutor knew that those magistrates took no part in the decision, if he knew enough to lead him to make some inquiry as to them, and even if he did not know that they did not take part in the matter and he was not misled, the rule will follow the same course which is adopted where unsuccessful applications are made against magistrates.(q)

— *Costs*.—If a rule nisi for a mandamus to hear an appeal have been obtained upon affidavits imperfectly stating the grounds upon which the Sessions proceeded in their judgment, and the facts submitted are substantial and material to the case, the Court will discharge the rule with costs.(r) So, where a Court of Quarter Sessions dismissed an appeal upon a frivolous objection, and on a rule nisi for a mandamus to hear being afterwards obtained, the respondent parish shewed cause relying on [*235] such objection, the *Court under the discretion given by stat. 1 Wm. 4, c. 21, s. 6, ordered such respondent parish to pay the costs.(s)

(l) *R. v. Wilts. (J.)*, 2 Chit. 257.† *Bac. Abr. tit. "Man."* (D.)

(m) *R. v. East India Company*, 4 M. & S. 279, cited in *R. v. East India Company*, 1 N. & M. 352.† See tit. "*East India Company*," and post, tit. "*Application*."

(n) *R. v. Chesh. (J.)*, 15 L. J., N. S. 113, M. C. See post, tit. "*Application*."

(o) *R. v. West Riding (J.)*, 1 G. & D. 706, 708, 709, per Ld. Denman, C. J. S. C. 2 Q. B. 505,† n. (a.) S. C. 6 Jur. 506. S. C. 11 L. J., N. S. 80, M. C. *R. v. Cheshire (J.)*, 4 D. & L. 94. S. C. 15 L. J., N. S. 114, M. C. See post, tit. "*Application*."

(p) *R. v. Norwich (J.)*, 3 D. & R. 47.†

(q) *R. v. Wilts (J.)*, 8 D. 717, 722; 4 Jur. 460, and see *R. v. Ellis*, 2 D., N. S. 361; 4 A. & E. 354.† See post, tits. "*Application*," "*Costs*."

(r) *R. v. W. R. (J.)*, 14 L. J., N. S. 119, M. C. See post, tits. "*Application*," "*Costs*" (*Affidavits*), "*Rule*."

(s) *R. v. Surrey (J.)*, 15 L. J., N. S. 117, M. C. See post, tit. "*Costs*."

—]. *Case*.—The Court of B. R. will not issue a mandamus to command a Court of Quarter Sessions to grant a case, that being a matter of pure discretion (*t*), although under special circumstances it may issue to command the sessions to state a case. (*u*) But it will not do so where it is clear that such a proceeding can lead to no useful result, as where the chairman, in consequence of his own opinion and that of the Court upon the facts, refused to sign any statement but one, which would have excluded the point of law relied upon by the party demanding the case. (*v*) But if the sessions have granted a case, then the court of B. R. will not, except under special circumstances, interfere by mandamus, (*w*) although the applicants have not brought the case up, provided there be no default on the part of the justices; because as a mandamus lies only where there is no other remedy, and the case so sent gives the opportunity of a complete and ready remedy for any misdecision, it follows, that if the justices have themselves provided a complete remedy by granting a case, neither of the parties can successfully abandon such remedy and apply for a mandamus. (*x*) It has been settled that if the case be not brought up, the Court of B. R. will refuse to hear the point discussed on an application for a writ to enter continuances, and hear the appeal. (*y*) But if the justices cannot agree for several sessions on the terms of the case, the Court of B. R. will grant a mandamus to enter and hear the appeal, for the Court cannot, as before stated, command them by mandamus to grant a case. (*z*) The Court of B. R. will not, however, entertain a case where an alternative of the question presented for their decision involves the necessity of sending the appeal back to the sessions to be heard. (*a*)

Where the sessions have granted a special case which has not been settled within six months after having been granted, and therefore the certiorari for removing the orders of magistrates and sessions has not been sued out within six months from the time of granting the case as it should have been, the Court of B. R. will not grant a mandamus to com- [*236] mand the *sessions to enter continuances and hear the appeal. (*b*)

(*t*) Ante, p. 12—15. Peat's case, 6 Mod. 229. R. v. Suffolk (J.), 1 D. 163, and see 1 D. & L. 844. See tit. "Poor" (Case).

(*u*) Ex parte Jarvin (Inhabs.), 9 D. 120. R. v. Pembrokesh. (J.), 2 B. & Ad. 391.† R. v. Eflingham there cited. See ante, p. 219.

(*v*) Ante, p. 15, 16, n. (*w*), 27, 28. R. v. Pembrokesh. (J.), 2 B. & Adol. 391.†

(*w*) R. v. Kesteven, 1 D. & M. 115. S. C. 3 Q. B. 810.† S. C. 13 L. J., N. S. 72, M. C. R. v. Suffolk (J.), 6 A. & E. 109.† S. C. 1 N. & P. 306.† See R. v. West Riding (J.), 11 L. J., N. S. 84, M. C., where it is laid down that if the sessions merely volunteer a case, which is declined by the prosecutor, his right to a mandamus is not thereby prejudiced.

(*x*) Ante, p. 21. R. v. Cartworth (Inhabs.), 1 D. & L. 844. R. v. West Riding (J.), 1 A. & E. 606, 607.† S. C. 3 N. & M. 757.† R. v. Carnarvon (J.), 4 B. & A. 86.†

(*y*) R. v. Suffolk (J.), 6 A. & E. 109.† S. C. 1 N. & P. 306.†

(*z*) R. v. Suffolk (J.), 1 D. 163. See 1 D. & L. 844. Peat's case, 6 Mod. 229.

(*a*) R. v. Wistow, 1 G. & D. 681, cited in R. v. Kesteven, 1 D. & M. 116. S. C. 3 Q. B. 810. See ante, p. 16, n. (*w*).

(*b*) R. v. Staffords. (J.), 1 D. 484. R. v. Pembrokesh. (J.), 2 B. & Adol. 391.† See post, tit. "Application."

In all similar cases where the Court has interfered by mandamus, such proceedings had been taken by the appellant, that if the case had been settled, the matter might have been discussed in the Court of B. R.(c)

The Court will sometimes withhold a peremptory mandamus to hear an appeal, in order that the justices may, in the mean time, state a case.(d)

—.] *Rehearing*.—The writ does not lie to command the Quarter Sessions to rehear an appeal, although erroneously decided; because as the Court of B. R. is not a Court of appeal from such Court, so it has no jurisdiction to review the judgment thereof, except on a case sent up for their consideration; and therefore where the sessions after having heard the witnesses on one side, refused to hear those on the other, on the ground that their testimony had been prefaced by observations on the part of the advocate contrary to the usual practice, the Court of B. R. refused to grant a mandamus to rehear the appeal, on the ground that it had no power to command the rehearing of an appeal which had been once heard.(e) So that the Court of B. R. will not, by this writ, constitute itself a Court of appeal from Quarter Sessions;(f) if, therefore, the sessions have either heard or disposed of an appeal, &c., the Court of B. R. will not command the rehearing of it.(g)

The writ does not lie to command a justice to hear a charge of felony after it has been dismissed by the sessions.(h) Nor will a rehearing be granted after judgment given by the justices and entered by the clerk of the peace for quashing an order, upon the ground that the justices at sessions were divided in opinion, and that the judgment was entered by mistake instead of an adjournment of the appeal.(i) And notwithstanding that the Quarter Sessions may promote the application to the Court, for as they have the power to rehear, they may do so without a

(c) 1 D. 487. Supra, n. (b), and ante, 27, 28.

(d) 1 D. 169, supra, n. (g), and p. 234, n. (m). See tit. "East India Company."

(e) Ante, p. 27, 28. R. v. Carnarvon (J.), 4 B. & Ad. 86.† In re Pratt, 7 A. & E. 27.† S. C. 2 N. & P. 102. Ex parte Brosely, 7 A. & E. 423.† S. C. 2 N. & P. 355. R. v. Pontefract (Recorder), 2 Q. B. 548.† S. C. 2 G. & D. 700. R. v. Wilts. (J.), 2 Chit. 257;† and see 4 B. & Ad. 398.† R. v. West Riding (J.), 3 N. & M. 89.† R. v. Monmouthsh. (J.), 7 D. & R. 334.† S. C. 4 B. & C. 849.† See tits. "Courts Inferior" (Rehearing), "Certiorari."

(f) R. v. Buckinghamsh. (J.), 2 G. & D. 560. R. v. West Riding (J.), 1 Q. B. 624.† S. C. 1 G. & D. 198. R. v. West Riding (J.), 3 G. & D. 173. S. C. 5 Q. B. 1.† See tit. "Certiorari," and ante, p. 10, 11.

(g) Ante, p. 231, 222. R. v. Dean, 2 Q. B. 731.† Ex parte Ackworth, 3 Q. B. 397.† In re Pratt, 7 A. & E. 27.† S. C. 2 N. & P. 102.† R. v. Gloucestersh. (J.), 1 B. & Ad. 3.† R. v. West Riding (J.), 1 Q. B. 630.† S. C. 1 G. & D. 205. As to what is a hearing, see R. v. Kent (J.), 14 East, 397; 1 B. & Ad. 4, 5.† See tit. "Certiorari."

(h) 2 Q. B. 731,† supra, and ante, p. 13.

(i) R. v. Leicestersh. (J.), 1 M. & S. 442. See also 7 D. & R. 334.† S. C. 4 B. & C. 844.† See post, p. 237—239.

mandamus; and therefore in such a case the Court of B. R. will refuse the writ.(j)

*The confirmation of an appeal at Quarter Sessions does not prevent a mandamus to hear;(k) neither does the dismissal.(l) [*237]

—.] *Application*.—The applicants must shew themselves strictly entitled to the mandamus.(m)

—.] *Review*.—Where the sessions have declined to hear a case or an appeal, on a preliminary objection shutting out the merits of the case, such decision may be reviewed by the Court of B. R.(n) But the writ does not lie to command the Court of Quarter Sessions to review their decision on an appeal, except on a case stated, on the ground that the adjudication was not warranted by the evidence; the Court of Quarter Sessions being the sole judges of the effect of evidence laid before them.(o) And it may be taken as a rule, that where justices of the peace in or out of sessions, have acted within their jurisdiction and duty, and according to the best of their judgment, a mandamus will seldom be granted commanding them to review their judgment.(p)

—.] *Judgment*.—The writ lies to command a Quarter Sessions to enforce the judgment of a previous sessions, no unnecessary delay having occurred; for in the absence of any particular restriction, a subsequent Quarter Sessions has such power.(q)

—.] *Costs*.—The writ also lies to command the award of costs in a matter wherein such an award is compulsory.(r)

—.] *Records of Quarter Sessions, Erasure, &c.*—The Court of Quarter Sessions has no power to erase an entry from the records of a past

(j) Ante, 15, 16. R. v. Gamble, 11 A. & E. 69.† cited in R. v. West Riding (J.), 1 Q. B. 639.† S. C. 1 G. & D. 205. See post, tit. "Application."

(k) R. v. Lindsey (J.), 6 M. & S. 379. R. v. Hertfordsh. (J.), 4 B. & Ad. 561.† R. v. Derbysh. (J.), 6 A. & E. 889.† S. C. 1 N. & P. 148.† n. (a). See ante, p. 11.

(l) R. v. Lancashire (J.), 7 B. & C. 691.† 6 A. & E. 889.† S. C. 1 N. & P. 148.† n. (a), supra, and see 4 M. & S. 327; 8 B. & C. 640.† 6 M. & S. 395. See tit. "Courts Inferior."

(m) Ante, p. 27, 28; 4 M. & S. 327, supra. R. v. Hereford (J.), 3 T. R. 504. See post, tit. "Application."

(n) Ante, p. 9, per Coleridge, J. R. v. Carnarvonsh. (J.), 1 G. & D. 426. S. C. 2 Q. B. 325.† R. v. Gloucestersh. (J.), 1 B. & Ad. 5. See supra, "Hearing," "Appeal," and tit. "Inferior Courts" (Review.)

(o) Ante, p. 236, n. (e). R. v. Worcestersh. (J.), 1 Chit. 649.† R. v. Devon (J.), 1 Chit. 34.† R. v. The Justices of ———, 1 Chit. 164.† R. v. Monmouthsh. (J.), 7 D. & R. 334.† S. C. 4 B. & C. 849.† R. v. Suffolk (J.), 5 N. & M. 144.† S. C. 3 A. & E. 725.† R. v. Leicestersh. (J.), 1 M. & S. 442. R. v. Westmoreland (J.), M. T. 23 Geo. 2, Bott. 734, 5th edit. Bodmin v. Warlingen, Bott. 733. R. v. Chesh. (J.), 8 A. & E. 399, 401.† R. v. Monmouthsh. (J.), 8 B. & C. 138.† Bac. Abr. tit. "Man." (D.)

(p) Ante, p. 12—15. R. v. Radnor (Earl), 4 Jur. 460.

(q) Ante, p. 12. R. v. Warwicksh. (J.), 2 A. & E. 768.† 1 D. & L. 145. See infra, "Records, &c." And see tits. "Execution," "Inferior Courts" (Judgment, &c.)

(r) R. v. Monmouthsh. (J.), 1 D. & L. 145. See tits. "Costs," "Poor," (Relief, Costs.) And see post, tit. "Costs."

session.^(s) But a mandamus will be granted to command such Court to do so where an entry has been made which is either manifestly false, and [*238] also made without *jurisdiction, or where it may prejudice a future proceeding, as an appeal.^(t) But not where the entry is perfectly harmless and innocuous,^(u) or where it is made in a matter over which the Court of Quarter Sessions has jurisdiction. Thus, where the Quarter Sessions, having jurisdiction over an appeal, directed an entry to be made, that an order of removal had been "quashed not on the merits," the Court of B. R. refused to grant a mandamus to command an erasure of that entry, although it appeared that the order, in point of fact, was quashed on the merits.^(v) Nor can the Court of B. R. direct the Court of Quarter Sessions to alter the minutes of a verdict given on an indictment, although neither regularly nor truly recorded; in such a case, application for relief should be made to the Secretary of State.^(w)

The writ will, however, be granted to command the Court of Quarter Sessions to make up a record according to the facts; thus, where a party has been found guilty at a sessions irregularly holden, he is entitled to have the record of the proceedings correctly made up, and after demand and refusal the Court will grant a mandamus for that purpose.^(x) So the Court constantly commands, by mandamus, that continuances be entered, which is only supplying a similar defect.^(y) But it has been held, that the Court of B. R. will not command the rectification of an error in the record of a judgment of Quarter Sessions; for the Court of B. R. cannot, in order to supply a remedy, exercise a jurisdiction which does not belong to them.^(z) For if any error have been made in the entry of the clerk of the peace, that error should have been pointed out at the sessions while the Court was sitting, and competent to reform its own errors, and to draw out a correct judgment: if such an application were entertained, the consequence would be, that the Court of B. R.

(s) *R. v. West Riding (J.)*, 3 G. & D. 170. S. C. 5 Q. B. 1.† S. C. 12 L. J., N. S. 148, M. C., (where see form of writ). It is the only case as to the erasure of an entry, and was one of a very peculiar nature, and not according to precedent. 1 D. & L. 718. S. C. 3 Q. B. 397.† See tits. "Conviction" (Record), "Courts Inferior" (Record). See ante, p. 94, n. (rr).

(t) *R. v. West Riding (J.)*, 3 G. & D. 170. S. C. 5 Q. B. 1.† Ex parte Pontefract (Overseers), 3 Q. B. 391.† S. C. 3 G. & D. 188. See ante, p. 9, 10.

(u) *B. v. Cornwall (J.)*, 5 Q. B. 9.† n. (a). But see 3 Q. B. 397.† S. C. 1 D. & L. 718. supra. *R. v. Glamorgansh. (J.)*, 15 L. J., N. S. 119, M. C.

(v) Ex parte Ackworth (Overseers), 1 D. & L. 718. S. C. 3 Q. B. 397.† S. C. 13 L. J., N. S. 33, M. C.

(w) *R. v. Hewes*, 3 A. & E. 725.† S. C. 5 N. & M. 139.† And see *R. v. West Riding (J.)*, 5 Q. B. 5.† S. C. 1 D. & M. 590. S. C. 3 G. & D. 170. *R. v. Carlyle*, 2 B. & Ad. 971.† See tits. "Compensation" (Company, Judgment), "Courts Inferior" (Records, &c.)

(x) *R. v. Middlesex (J.)*, 5 B. & Ad. 1113.† S. C. 3 N. & M. 110,† cited in 5 Q. B. 5.† S. C. 3 G. & D. 170, supra. See tits. "Conviction" (Records, &c.), "Courts Inferior" (Records, &c.)

(y) Ante, p. 232, n. (a). *R. v. Suffolk (J.)*, 5 N. & M. 144.† See tit. "Poor" (Appeal).

(z) Ante, p. 86, n. (z). *R. v. Leicestersh. (J.)*, 1 M. & S. 444. See tit. "Courts Inferior."

would have on all occasions to look, not to the record alone, but to extraneous matter, in order to see how the judgment of the justices at sessions was obtained, which it will not do; nor when judgment has been finally pronounced, will it hold a sort of balloting box to ascertain the votes that were given, or whether they were correctly cast up.(a) So, it [*239] has been held, that the Court of B. R. has no authority to command the Quarter Sessions, by mandamus, to give their reasons for their judgments, or make any special entries upon their records; and a rule for such a mandamus will be discharged with costs, for the reason of the judgment must be collected from the record; in fact, an application for this purpose has always been refused.(b) Thus, where the Quarter Sessions on appeal have quashed an order generally, the Court of B. R. will not command them, by mandamus, to enter their reasons on the order to quash, though it appear by affidavit that the justices in sessions made their order on the ground of informality, but refused a special entry of their grounds, for the purpose of preventing a second removal.(c) Nor will the Court grant a mandamus to command the Quarter Sessions, or the clerk of the peace, to enter up judgment upon the verdict of a jury, otherwise than in the terms in which it is given by the jury, even though it appear by affidavit, that in considering the amount of damages to be assessed by them, they took into consideration matters not properly within their jurisdiction.(d)

— 2nd PETTY SESSIONS, JUSTICES, &c.]. *Duties*.—If justices or justices in Petty Sessions improperly refuse to hear, or otherwise improperly neglect to enter upon the discharge of their duties, &c., the Court of B. R. will grant a mandamus and command them to do their duty; but not if such refusal or neglect do not involve a defect of justice.(e) Thus, where magistrates, after having taken the examination of a pauper, brought before them with a view to make an order of removal, which they declined to make, on the ground that the examination disclosed a settlement in the applicant's parish, the Court refused, upon a suggestion that the refusal was founded upon erroneous grounds, to grant a writ of man-

(a) 1 M. & S. 444; and see 1 Chit. 34,† and 2 Salk. 607. In *R. v. West Riding (J.)*, 5 Q. B. 5,† per Lord Denman, C. J., it was said, that the wonder was that a rule nisi was granted in *R. v. Devon (J.)*, 1 Chit. 34.† See “Courts Inferior” (Records, Alteration).

(b) *R. v. Devon (J.)*, 1 Chit. 34.† *South Cadbury v. Braddon*, 2 Salk. 607. But see 5 Q. B. 5,† where Lord Denman, C. J., says, that “it is a wonder that a rule nisi was granted in that case”—(1 Chit. 34.)† See *supra*, “Judgment.”

(c) *R. v. Lancash. (J.)*, 3 Q. B. 367.† S. C. 2 G. & D. 714. S. C. 12 L. J., N. S., 76, M. C. *R. v. West Riding (J.)*, 1 G. & D. 206. S. C. 1 Q. B. 624.† *R. v. Wheelock*, 5 B. & C. 511.†

(d) *R. v. West Riding (J.)*, 3 N. & M. 802.† See tit. “Compensation” (Judgment.)

(e) *Ante*, p. 9. *Caly v. Hardy*, Holt, 407. *R. v. Cumberland (J.)*, 4 A. & E. 695.† *R. v. West Riding (J.)*, 1 G. & D. 198. S. C. 1 Q. B. 629.† *R. v. Rogers*, 2 D., N. S. 673. *R. v. Beard*, 12 East, 672. *R. v. Derbysh. (J.)*, 4 T. R. 488. *R. v. Cory*, 3 Salk. 230, 6. *R. v. Tod. Stra.* 530. *R. v. Jukes*, 8 T. R. 625. See tits. “Act of Parliament,” “Courts Inferior,” *supra*, p. 105, “Inferior Courts,” “Officers.”

damus to the justices to command them to make such order.(f) Also, as before stated, the writ does not lie to command them, as judicial officers, to act in any particular mode, unless it be clear that the magistrates have neglected some duty imposed upon them by law;(g) although it lies to command them to proceed and give judgment on a complaint pending before them, over which they have jurisdiction; but a return that they [*240] have heard and determined the *complaint, is good.(h) The writ does not lie to command justices to do that which they are not legally bound to do, or to exercise a doubtful jurisdiction; for the Court will see clearly that the magistrates have neglected some duty imposed upon them by law, before it will command them to act in any particular mode.(i) Nor will the Court command certain justices to do that which others could not do with greater propriety.(j) It may be stated to be a general rule, that where any two of many magistrates assembled at Petty Sessions, improperly refuse to do an act which two may perform, a mandamus will lie against them(k) alone for the performance of such duty.

—]. *Warrant.*—The Court of B. R. will not command justices to do an act, as to grant and issue a distress warrant if there be another remedy.(l) Nor formerly unless the Court saw *clearly* that the act would be legal,(m) and not *reasonably* subject them to an action, the event of which would be doubtful;(n) for until lately the mandamus was no indemnity to the magistrates who executed it.(o) Thus where a party who had been convicted and sentenced, gave notice of appeal, and was com-

(f) R. v. Rogers, 2 D., N. S. 673. S. C. 12 L. J., N. S. 51, M. C.

(g) Ante, p. 9, 10. R. v. North Riding, 2 B. & C. 290.† Bac. Abr. tit. "Man." (D.) See post, tit. "Writ" (Form).

(h) Ante, p. 231, n. (i). R. v. Richardson, 1 Wils. 16. Com. Dig. tit. "Man." D. 3. R. v. London, (J.), Burr. 1456. R. v. Tod, 1 Stra. 530. In re Gateshead (J.), 6 A. & E. 550,† n. (a). See tit. "Courts Inferior," (To proceed, &c.)

(i) Ante, p. 17. R. v. North Riding (J.), 2 B. & C. 286, 290.† R. v. Sillefant, 5 N. & M. 643.† R. v. Lord Godolphin, 8 A. & E. 338.† S. C. 3 N. & P. 488. But see stat. 6 & 7 Vict. c. 67, s. 3, App., and as to Ireland, stat. 9 & 10 Vict. c. 113, s. 8, which indemnify for any thing properly does in the execution of a mandamus; the Court will, therefore, more readily grant the writ in doubtful cases.

(j) In re Gateshead (J.), 6 A. & E. 550,† n.

(k) Ante, p. 12. R. v. Ellis, 2 D., N. S. 361. See ante, p. 239, n. (e).

(l) Ante, p. 18—27. R. v. Dyer, 2 A. & E. 613.† S. C. 4 N. & M. 550.† R. v. Halls, 3 A. & E. 494.† R. v. Mirehouse, 2 A. & E. 637. S. C. 4 N. & M. 394.† R. v. Buckinghamsh. (J.), 2 D. & R. 689.† S. C. 5 B. & C. 485,† S. P. R. v. Buckinghamsh. (J.), 3 N. & M. 68.† See tits. "Distress," "Execution," "Poor" (Rate Defaulters).

(m) Ante, p. 17. R. v. Hants. (J.), 1 B. & Ad. 656,† but see now stats. 6 & 7 Vict. c. 67, s. 3, and 9 & 10 Vict. c. 113, s. 8 (I.), App. See tit. "Poor" (Rate Defaulter).

(n) R. v. Drake, 6 M. & S. 118. R. v. Broderip, 5 B. & C. 239.† S. C. 7 D. & R. 861.† R. v. Mirehouse, 2 A. & E. 637.† S. C. 4 N. & M. 394.† R. v. Buckinghamsh. (J.), 2 D. & R. 689.† S. C. 1 B. & C. 485.† R. v. Sillifant, 5 N. & M. 641.† R. v. Hughes, 3 A. & E. 425.† S. C. 5 N. & M. 94.† R. v. Godolphin, 8 A. & E. 338.† S. C. 3 N. & P. 488; Bac. Abr. tit. "Man." (D.)

(o) R. v. Newcombe, 4 T. R. 368; but see now stats. 1 W. 4, c. 21; 6 & 7 Vict. c. 67, s. 3, and 9 & 10 Vict. c. 113, s. 8 (I.), App. R. v. Paynter, 7 Q. B. 266.† S. C. 14 L. J., N. S. 179, Q. B.

mitted for want of recognizances, and at the sessions he did not take the proper steps for entering his appeal, and was discharged by such Court. The Court of B. R. refused to grant a mandamus to command the convicting justices to commit him in execution of the conviction, it being doubtful whether they had any further jurisdiction, as such a course might subject the justices to an action.^(p) So the Court of B. R. will not call upon magistrates to issue a distress warrant, unless the case be perfectly clear, and there be reason to suppose *that the magistrates act from [241] caprice or bias in withholding the warrant; notwithstanding it is bound to see that the magistrates are acting bona fide in the discharge of their duty by refusing the warrant, but if they are so acting, a very strong case must be made out to induce the Court to call upon them to issue a warrant which may subject them to an action, against which there is no indemnity.^(q) The Court of B. R. will also refuse to interfere, in cases where the act which the magistrates are called upon to do, may, in itself, be harmless, if the subsequent proceedings may reasonably subject them to an action. Thus, although no action will lie against justices for making an order for the payment of money, &c., yet if the making it may place them in the predicament, that in case of disobedience they must either see their authority disregarded with impunity, or take the next step, that of issuing a distress warrant, which will bring them within the peril of an action, the Court will refuse the writ to command them to make such an order.^(r) Nor in such cases will the Court grant the writ, even though the prosecutor have no other means of obtaining relief.^(s) But where a clear case is made out, the Court of B. R. has always refused to and will not now sanction magistrates in abstaining from the performance of an official duty, either on grounds not sufficient in reason, or from reluctance to incur any proper responsibility.^(t)

Previously to the passing of the recent acts of Parliament, namely, 6 & 7 Vict. c. 67, s. 3 (E), and 9 & 10 Vict. c. 113, s. 8 (I), it was, in cases of difficulty, usual and prudent to request the magistrates to act upon a sufficient indemnity, actually tendered, after which the Court usually granted the writ. But where a prosecutor, having previously to a motion for a rule for a mandamus, merely proposed to call a meeting, for the purpose of obtaining an indemnity for the magistrates, without actually offering a sufficient indemnity, the rule was discharged with

(p) Ante, p. 17. R. v. Twyford, 6 N. & M. 836.† S. C. 5 A. & E. 430.† See tits. "Conviction," "Poor" (Rate Defaulters).

(q) Ante, p. 17. R. v. Dyer, 4 N. & M. 550.† S. C. 2 A. & E. 613.† R. v. Buckinghamsh. (J.), 3 N. & M. 68,† and see S. C. (at R. v. Morgan), 2 A. & E. 618,† n. (a); also R. v. Buckinghamsh. (J.). 1 B. & C. 485.† S. C. 2 D. & R. 689.† R. v. Trecothick, 2 A. & E. 405;† 3 A. & E. 499,† supra. But see stats. 6 & 7 Vict. c. 67, s. 3; 9 & 10 Vict. c. 113, s. 8 (I.), App. See tit. "Rate," and p. 239, n. (c).

(r) Ante, p. 17, 240, n. (i). R. v. Sillifant, 6 N. & M. 642,† n. (g).

(s) 1 B. & C. 485.† S. C. 2 D. & R. 693,† supra, n. (g).

(t) Ante, p. 13; 2 A. & E. 643,† per Coleridge, J., supra. R. v. Hants. (J.), 1 B. & Ad. 656.† 1 B. & C. 485.† S. C. 2 D. & R. 689, 694,† per Abbott, C. J., supra. R. v. Codd, 9 A. & E. 682.† S. C. 1 P. & D. 456. R. v. Barker, 6 A. & E. 388.†

costs.(u) If, however, there was no doubt in the case, the Court usually granted the writ, although no indemnity had been offered to the justices.(v) Thus where in answer to an application for a mandamus against magistrates to command them to issue distress warrants to levy a poor rate, it was suggested that the warrants would have to be executed [*242] within Hampton Court Palace, that the officers of the *Crown claimed that the property was exempt from the operation of such warrants, and threatened proceedings if they were executed; the Court nevertheless granted the writ, and refused to call upon the applicant parish to give the magistrates an indemnity against the consequences of any proceedings which might be taken, because the order of the magistrates would be simply to levy on the goods and chattels of the persons named in the writ.(w)

At this day the Court of B. R. will not issue a mandamus to justices in a doubtful case, merely in order that they may make a return, and be protected by stat. 6 & 7 Vict. c. 67, s. 3, if a peremptory mandamus should issue and be obeyed. But should such a writ be issued to them, they ought not, in order to gain the protection of the statute, to make a return, but should obey the writ.(x)

The Court of B. R. will not order magistrates to do that which may reasonably occasion them costs, for which they have no means of reimbursing themselves.(y)

The Court of B. R. has refused a mandamus to command the chairman of a Quarter Sessions to issue process for the apprehension of two persons against whom a bill of indictment had been found a year previously, upon the ground that an application for such process had been rejected at sessions.(z)

— *Application.*—Although there may have been more than two magistrates at petty sessions, all of whom took part in a decision, it is not necessary that upon an application for a mandamus, all who were present and took part in such decision, shall be included in the rule; but if the Court sees that any two have been selected, or that any of the justices so acting, have been omitted for any improper purpose, it will require all to be joined.(a)

— *Rule, Service.*—Service of a rule nisi for a mandamus against

(u) *R. v. Somersetsh. (J.)*, 4 N. & M. 394.† *S. C.* 2 A. & E. 637.† But see the indemnity conferred by stat. 6 & 7 Vict. c. 67, s. 3, and 9 & 10 Vict. c. 113, s. 8 (I.), App.

(v) *R. v. Marriott*, 12 A. & E. 779.† In *R. v. Ellis*, 2 D., N. S. 361, the justice was trustee of the property, upon which it was sought to enforce the warrant. *R. v. Middx. (J.)*, 12 L. J., N. S. 36, M. C. See ante, tit. "Poor" (Rate Defaulters.)

(w) *R. v. Middx. (J.)*, 2 D., N. S. 385.

(x) *R. v. Dartmouth (Earl)*, 5 Q. B. 878.† *S. C.* 1 D. & M. 126. See as to Ireland, stat. 9 & 10 Vict. c. 113, s. 8, App.

(y) Ante, p. 17. *Ex parte Carlton High Dale*, 4 N. & M. 313.

(z) *R. v. Russell*, 1 D., N. S. 544; 6 Jur. 221. See tit. "Prisoner."

(a) Ante, p. 228, n. (x). *R. v. Ellis*, 2 D., N. S. 361; 4 A. & E. 354.† *R. v. Wilts. (J.)*, 8 D. 717, 722. *S. C.* 4 Jur. 460. See post, tit. "Application."

a determination of the petty sessions, need not be served upon the clerk of the peace; it will be sufficient if it be served on the justices whose decision is complained against, and also upon the high constable of the hundred; which service is in conformity with the practice of the Crown Office.(b)

QUEEN.] See titles *Crown; Customs (Commissioners); Excise (Commissioners); Treasury, Lords.*

*RAILWAY.] This subject is arranged as follows:— [*243]

RAILWAY.				RAILWAY.			
Duties, &c.	-	-	- 243	Compensation	-	-	- 244
Rule	-	-	- 244	Goods, &c.	-	-	- 244
Returns	-	-	- 244	Appeal	-	-	- 245

—.] *Duties, &c.*—The writ of mandamus lies to command a railway company to set out and define the line of their railway, and to proceed to purchase the lands necessary to the making and completion of the same pursuant to the provisions of their acts.(c) Thus the Court has made absolute a rule for a mandamus to command a railway company to proceed according to the terms of the act of Parliament, obtained by them to set out and complete their line from A. to B., although they had executed part, and the time had not arrived within which they were to execute the remainder, and their funds were inadequate for the purpose, the Court being of opinion that they had no bona fide intention to complete the whole work.(d) The writ must, however, be applied for within a reasonable time.(e) It has also been held that such a writ does not lie to command a company to maintain the railway when constructed.(f)

But where a railway made under the authority of an act of Parliament, by which the proprietors were incorporated, and by which it was provided, that the public should have the beneficial enjoyment of the same; was afterwards taken up by the company, it was held that a mandamus might issue to command the company to reinstate, and lay down again the railway;(g) although they were liable to an indictment for not so doing; for

(b) *R. v. Tucker*, 5 D. & R. 434.† S. C. 3 B. & C. 545, 546.† See post, tit. “Rule” (Service), and ante, p. 234. As to costs of unsuccessful application, p. 234.

(c) *R. v. Eastern Counties Railway*, 10 A. & E. 531.† S. C. 4 P. & D. 48, where see a form of writ. S. C. 1 Rail. Cas. 509; 2 Rail. Cas. 260. S. C. 9 L. J., N. S. 303, Q. B. This appears to be the first mandamus as to railway matters. *R. v. Gamble*, 11 A. & E. 72.† S. C. 3 P. & D. 123. See tits. “Act of Parliament,” “Company,” “Inclosure.”

(d) *R. v. Eastern Counties Railway*, 2 P. & D. 648. S. C. 10 A. & E. 531.† S. C. 1 Rail. Cas. 509; but see tit. “Application.”

(e) *R. v. Birmingham Railway, &c.*, 1 G. & D. 335. S. C. 1 Q. B. 47 † See post, tit. “Application” (when to be made.)

(f) 10 A. & E. 543.† S. C. 4 P. & D. 48. *R. v. Severn Railway*, 2 B. & A. 646.†

(g) *R. v. Severn Railway*, 2 B. & A. 646.† *R. v. Eastern Counties Railway*, 10 A. & E. 543.† S. C. 4 P. & D. 48. *R. v. Gamble*, 11 A. & E. 72.† S. C. 3 P. & D. 123. *R. v. Pagham Sewers*, 2 M. & R. 471. See tits. “Act of Parliament,” “Inclosure.”

such a proceeding merely punishes for past defaults, and is not, therefore, an efficacious remedy. *(h)*

The writ has also been often granted to command a railway company to increase the height of a bridge erected by them over a public carriage road, according to the provisions of their act of Parliament. *(i)*

So the writ lies to command such a company to execute and complete, [*244] *certain works, railways, roads, bridges, drains, &c., which the company has undertaken to execute and complete by virtue of the powers entrusted to them by act of Parliament; *(j)* or to command the restoration of a turnpike road, which has been, by a railway company carried over their railway, to its proper width, and also to excavate and widen roads crossed by a railway. *(k)*

— *Rule.*—The rule for a writ for any of the before-mentioned purposes, will be discharged if there have not been a demand made to, and a refusal by the company both before and after the works were completed, to execute, &c. the necessary works, and comply with their act of Parliament. *(l)*

— *Returns.*—Where a railway or other company has by its act of incorporation, &c., stipulated with the public to do a certain act, it is not a good return that such act cannot be executed by the company, owing to the want of funds, or, that funds cannot be raised without a new act, &c. *(m)* Nor is it a good return, that the approaches of a bridge, though of a less width, are as convenient to the public, as they could be made in execution of the powers of the act, and as convenient to the public as the original road had been; or that the company could not widen the approaches, without taking or purchasing more land, that their compulsory powers of purchasing under the act had expired, before they had been

(h) Ante, p. 24. *R. v. Birmingham Canal*, W. Blac. 708, n. *(b)*; 2 B. & A. 646, † supra. "But it is the general opinion that *R. v. Severn Railway*, (supra, n. *(g)*), went to an extreme length as to this point." 3 P. & D. 123, per *Ld. Denman, C. J.*

(i) *R. v. Eastern Counties Railway*, 2 G. & D. 1 S. C. 2 Q. B. 569. † S. C. 11 L. J., N. S. 178, Q. B. But see *R. v. Eastern Counties Railway*, 4 Jur. 318. See tits. "Highway," "Inclosure."

(j) Ante, p. 12. *R. v. Brecknock Canal*, 3 A. & E. 217. † *R. v. Bristol Railway* 3 G. & D. 384. S. C. 4 Q. B. 162; † 4 P. & D. 48. S. C. 10 A. & E. 531, † supra. See *Blackmore v. Glamorgansh. Canal*, 1 M. & K. 154. *R. v. Severn, &c., Company*, 2 B. & Ald. 646. *R. v. Cumberworth*, 1 N. & P. 197. † S. C. 4 A. & E. 731. † See 2 P. & D. 648. *R. v. York Railway*, 14 L. J., N. S. 277, Q. B. where see form of writ. *R. v. Norwich Railway*, 15 L. J., N. S. 24, Q. B. S. C. 3 D. & L. 385. See tits. "Act of Parliament," "Highway."

(k) *R. v. Birmingham Railway*, 1 G. & D. 324. S. C. 2 Q. B. 47, † where see form of writ and pleadings. *R. v. Manchester Railway*, 1 G. & D. 338. S. C. 3 Q. B. 528, † and 3 G. & D. 269, in error, where see form of writ and pleadings. *R. v. Bristol Railway*, 3 G. & D. 384. S. C. 4 Q. B. 162. † S. C. 12 L. J., N. S. 106, Q. B. See tits. "Highway," "Inclosure."

(l) Ante, p. 27, 28. *R. v. Bristol Railway*, 3 G. & D. 384. S. C. 4 Q. B. 162. † *R. v. Brecknock Canal* 3 A. & E. 219. † S. C. 12 L. J., N. S. 106, Q. B. See ante, p. 28; see post, tit "Application," (Demand and Refusal.)

(m) Ante, p. 109, n. *(t)*; 10 A. & E. 531. † S. C. 4 P. & D. 48, supra, where see form of such return. *R. v. Eastern Counties Railway*, 2 P. & D. 655, and cases there cited. See tits. "Act of Parliament," "Company," Courts Inferior" (Holding Courts.)

called upon to widen, and that they had not then, nor have since had the power to take or purchase land for such purpose.(u)

——.] *Compensation.* See title *Compensation (Company)*.

——.] *Goods.*—The writ does not lie to command a railway company to convey goods along their line, if there be no clause in their act of incorporation, requiring them to carry all goods offered for conveyance, although they may have agreed with certain persons to carry their goods to the exclusion of all others.(v)

*——.] *Appeal.*—The writ lies to command justices to hear and determine an appeal, under a railway act, over which they [*245] have jurisdiction.(p)

READING.] *Steward of; Restoration.*—The writ lies to restore the Steward of Reading to his office, it appearing to have profits, &c., annexed to it, and also to be an office pro bono publico.(q)

RECEIVER OF BEDFORD LEVEL.] See tit. *Bedford Level*.

RECORDER.] The writ lies for the office of recorder.(r)

This subject is arranged as follows:—

RECORDER.					RECORDER.				
Election	-	-	-	- 245	Returns	-	-	- 246	
Application	-	-	-	- 245	Restoration	-	-	- 246	
Rule	-	-	-	- 245	Returns	-	-	- 247	
Returns	-	-	-	- 245	DEPUTY RECORDER.				
Admission	-	-	-	- 246	Swearing in	-	-	- 247	

——.] *Election.*—The writ lies to command a municipal corporation to put the corporate seal to a certificate of the election of a recorder, in order that such recorder may obtain the approval of the Crown.(s) The writ will be granted for this purpose, notwithstanding the election of such recorder may have been contested.

——.] *Application.*—The rule for such a mandamus will be granted on affidavits that the applicant had the majority of legal votes at the elec-

(u) *R. v. Birmingham Railway*, 1 G. & D. 324. S. C. 2 Q. B. 47.† S. C. 3 Q. B. 528,† and 3 G. & D. 269, in error. See post, tit. "Return."

(v) *Ex parte Robins*, 7 D. 556. S. C. 1 W. W. & H. 578; 3 Jur. 193. *R. v. Severn Railway*, 2 B. & A. 646.† See tit. "Contract," and ante, p. 27, 28.

(p) Ante, p. 12. *R. v. Worcester (J.)*, 7 D. 789. See tits. "Appeal," "Quarter Sessions" (Appeal).

(q) *Blagrove v. Reading (Mayor)*, 2 Sid. 6, 49, 72, and see *Thompson's case*, 4 Jac., there cited. It was a writ of restitution in principal case. See also 1 Sid. 461, and tits. "Steward," "Office."

(r) 2 Roll. Abr. 456, l. 30. *R. v. Wells*, Burr. 1999; Com. Dig. tit. "Man." (A.); Bac. Abr. tit. "Man." (C.) See tit. "Office," ante, 174, n. (w), (x).

(s) *R. v. York (Mayor)*, 4 T. R. 699. S. C. 5 T. R. 66, where see a form of writ; and see 6 East, 360, n. (d). *R. v. Colchester (Mayor)*, 6 East, 360. See *R. v. Oxford (Mayor)*, 6 A. & E. 353,† per Coleridge, J. *R. v. Colchester (Mayor)*, 2 T. R. 259. *R. v. Cambridge (U.)*, 1 W. Blac. 551. S. C. Burr. 1647. See tits. "Certificate," "College" (Seal), "Corporation Municipal" (Seal), "Hospital" (Seal), "Seal."

tion, notwithstanding it may be stated, that another candidate had the majority at the election, and that the corporation had already certified his election, the office not being in such case *de facto* full.(*l*)

—.] *Rule*.—The rule for a writ for this purpose, is, like that to swear in a corporator, a matter of course, and absolute in the first instance.(*u*)

—.] *Returns*.—To such a mandamus, a return “that the [*246] corporation *were not duly assembled to proceed to the election of a recorder,” has been held to be bad, as a negative pregnant.(*v*) So, where a writ, after a statement of all the proceedings of the election, concluded thus, “by reason thereof A. was elected,” it was held, that to return that “he was not elected,” was bad, and that the defendant should have traversed one of the material facts alleged.(*w*)

—.] *Admission*.—The writ also lies to command an admission of one duly entitled to the office of recorder. If, however, there be one *de facto* not colourably elected, the applicant must adopt his remedy by quo warranto, by which the title to the office can be tried as effectually as by mandamus, and he must so proceed, notwithstanding the rival candidate may claim under the same election; for the consequence of granting a rule for a mandamus in such a case would be, that a second person would be admitted to an office already filled by another, both claiming to have been duly elected.(*x*)

—.] *Returns*.—A return to such a writ, that “the defendants did not know that the prosecutor had been elected a recorder,” has been held to be insufficient.(*y*)

—.] *Restoration*.—The writ also lies to restore to the office of recorder, one who has been improperly removed therefrom,(*z*) if he have a freehold in his office: such an officer is usually appointed by patent,

(*l*) 4 T. R. 699, *supra*, n. (*s*). R. v. Oxford (Mayor), 6 A. & E. 353.† See stat. 6 & 7 Vict. c. 89, s. 5, App. As to Ireland, see stats. 19 Geo. 2, c. 12 (1.); 9 & 10 Vict. c. 113 (1.) See tit. “Office” (Election, Application), and *ante*, p. 26, 27.

(*u*) 4 T. R. 699, 700, and 6 East, 360, *supra*, n. (*s*), stat. 6 & 7 Vict. c. 89, App. See tit. “Office” (Election Rule), and *post*, tit. “Rule.”

(*v*) R. v. York (Mayor), 5 T. R. 66. See tit. “Office” (Election Returns), and *post*, tit. “Return,” as to the present effect of a negative pregnant.

(*w*) 5 T. R. 66, *supra*, n. (*v*). See *post*, tit. “Return” (Certainty).

(*x*) *Ante*, p. 12, 26, 27. R. v. Colchester (Mayor), 2 T. R. 259. See R. v. Bedford Level (Corp.), 6 East, 360. R. v. York (Mayor), 4 T. R. 699. See R. v. Barker, Burr. 1265. R. v. Bloer, Burr. 1045. Bossiny’s case, Str. 1003. R. v. Bankes, Burr. 1453. S. C. 1 W. Blac. 415, 452, where a mandamus was granted, though there was a mayor *de facto*. See also Case of Aberystwith, Stra. 1157, and R. v. Cambridge (Mayor), Burr. 2008; Bae. Abr. tit. “Man.” C. 2. See tits. “Office,” “Mayor” (Election), (Election, Admission).

(*y*) Bassett v. Barnstable (Mayor), 1 Sid. 286. For other returns, see tit. “Office” (Admission, Returns).

(*z*) *Ante*, p. 12. Bassett v. Barnstable (Mayor), 1 Sid. 286; 6 Rep. 52. Awdley’s case, Nov. 78; Andr. 181; Trem. Pl. Cor. 541, where see form of writ. R. v. Corye, Sty. 86. This was a writ of restitution (*ante*, p. 3). R. v. London (Mayor), 2 Show. 69. R. v. Wells (Corp.), Burr. 1969, 2067. R. v. Holt, 3 Keb. 667, citing Blagrave’s case. Prins’ case, 1 Keb. 529, 541. Whitacre’s case, cited in 1 Barn. 295. The Protector v. Craford, Sty. 457. The Protector v. Colchester (Town), Sty. 446, 452. Ld. Hawley’s case, 1 Vent. 143. S. C. 2 Keb. 770, 796. S. C. 2 Salk. 430. Pepis’

quamdiu se bene gesserit,(a) and is a known officer, whose duty it is to administer justice in relation to the public.(b) But if a recorder be liable to be removed "at pleasure," which is sometimes the case, then a mandamus to restore will not be granted,(c) but such power to remove "ad litum" *must be returned.(d) Where there is a power to remove "ad litum," the choice of another person to be recorder, is tantamount [*247] to a declaration of removal; so that, in such a case, either an amotion, or the election of another, may be returned, as in the case of a tenancy at will, where the landlord may determine his will by express words, or by any act which is inconsistent with his estate.(e)

—.] *Returns.*—A return that the defendants did not know that the prosecutor was elected, is bad.(f)

As a recorder is bound to attend and assist at the sessions, in order that he may direct the corporation in the proceedings of justice, and his office is a public one, relating to justice, so non-attendance is a cause both of forfeiture and of return;(g) but such a return should state, that Courts have been held of which he had due notice, and that he wilfully absented himself.(h)

—.] *Deputy, Swearing in.*—The writ lies also to command the swearing in of a deputy recorder, legally and duly appointed.(i)

case, 1 Vent. 342; Sir T. Jones, 51. Dighton v. Stratford, &c., 2 Keb. 641. See tit. "Office" (Restoration).

(a) Ante, p. 175, n. (l).

(b) Eastwick v. London (City), Sty. 42. Holt's case, Freem. 441. See Barr. 1999, 2005, supra. See tits. "Constable," "Office" (Public), and ante, p. 12.

(c) Ante, p. 177, n. (n). Serjt. Whitacre's case, 11 Mod. 67 (cited also in R. v. Carlisle (Mayor), 11 Mod. 378). S. C. Ld. Raym. 1223, 1283. S. C. Holt, 443. S. C. 2 Salk. 434. R. v. Canterbury (Mayor), 11 Mod. 403. S. C. Stra. 674. See tit. "Office" (Restoration).

(d) See ante, p. 176. Pepis' case, 1 Vent. 342. Blagrave's case, 2 Sid. 49, 72. The authority of Blagrave's case has been attempted to be impugned, but unsuccessfully, Hurst's case, 1 Keb. 388; 1 Vent. 343; 2 Sid. 49, 72. See tit. "Office" (Freehold), and post, tit. "Return."

(e) R. v. Canterbury (Mayor), 11 Mod. 403. S. C. Stra. 674. R. v. Thame, Stra. 115. R. v. Taunton (Churchwardens), Cowp. 413. Pepis' case, 1 Vent. 342. See tit. "Office" (Freehold Returns).

So rules nisi for writs of mandamus to restore to a recordership have been granted, directed to the commissioners acting under the Statute of Corporations. Prin's case, 1 Keb. 520, 541. In such cases the Return usually made was that "they (the commissioners) adjudged it fitting, expedient, and for the public good that he (the person deprived) be not restored." On one occasion, when such a return was objected to on several grounds, and the Court was divided in opinion as to the "Expositions of the boundless commissions given by the late (this case was argued T. T. 15 Car. 2, B. R.) irregular powers to justices;" it conceived that "as the Parliament was then sitting, the best way was to adjourn the giving of judgment, and in the meantime pray advice of the Lords in Parliament as to the exposition of the act, and not to give any opinion on it during their sitting." 1 Keb. 541.

(f) Ante, p. 246, n. (y). Bassett v. Barnstable (Mayor), 1 Sid. 286. For other returns see the Protector v. Colchester City, Sty. 447, 453, and tit. "Office."

(g) Ante, p. 198. Serjeant Whitacre's case, 11 Mod. 67. R. v. Ipswich (Bailiffs), 2 Salk. 434, 435, citing R. v. Wells (Corp.), Burr. 1999; and see tit. "Office" (Restoration Returns), and post, tit. "Return."

(h) Bath v. Ld. Hawley, 2 Keb. 770, 797, P. 1655, in Barnardiston's case, Stiles, 452.

(i) Ante, p. 12. R. v. St. Alban's (Mayor), 12 East, 559. See R. v. Roberts, 3

RECORDS.] See titles *Accounts; Books; Records, &c.; Company; Corporation Municipal (Insignia); Courts Inferior (Records); Manor (Lect Records); Peace (Clerk of); Quarter Sessions (Records); Town Clerk (Records); Will (Delivery).*

REGISTER OF DEAN AND CHAPTER.] See tit. *Dean and Chapter.*

[*248] *REGISTERS OF MIDDLESEX.] *Registration.*—The writ lies to command the registers of Middlesex to register the memorial of a deed, duly stamped and executed, notwithstanding the body thereof be lithographed,(j) and not written in the ordinary way.

REGISTRAR OF LIVINGS.] See titles *Inspection; Livings; Parson.*

REGISTRAR OF BIRTHS, &c.] *Birth.*—The Court of B. R. has no power to issue a mandamus to the registrar of births, &c., under stat. 6 & 7 Wm. 4, c. 86, to command him to erase or alter the entry of a *Birth*, notwithstanding it appear that the child was not only supposititious, but that the entry had been made for fraudulent purposes, and though the application be made by a party having a pecuniary interest in defeating the alleged fraud.(k)

—.] *Marriage.*—The writ lies to command the superintendent registrar of marriages to issue his certificate, pursuant to stat. 6 & 7 Wm. 4, c. 85, s. 7, for a marriage within his district, but not out of it, for he has no jurisdiction.(l)

REGISTRAR.] This subject is arranged as follows:—

Registrar (Deputy) of Archbishop	Registrar of Bishop's Court -	249
of York - - - - - 248	Restoration - - - - - 249	
Admission - - - - - 248	— (Deputy) Admission - - - 249	
Registrar of Archdeacon - - 249	Registrar of Consistory Court - 249	
Admission - - - - - 249	Delivery of Records, &c. - 249	
Return - - - - - 249	Registrar of Ecclesiastical Court - 250	
Restoration - - - - - 249	Restoration - - - - - 250	

REGISTRAR OF ARCHBISHOP OF YORK'S COURT.] *Admission of Deputy.*—The writ lies to command the commissary of the Archbishop of York's Court, to admit and swear the deputy of the principal registrar of such Court, notwithstanding it is a spiritual office. The right to the office of registrar is to be determined at common law, and not in the Spiri-

A. & E. 776. See tits. "Deputy Officer," "Marches," "Office" (Deputy), "Registrar of Archbishop of York's Court."

(j) Ante, p. 12, 27, 28. R. v. Middlesex (Registers), 7 Q. B. 156.† S. C. nom. In re Ivimey, 14 L. J., N. S. 200. Q. B. See tit. "Act of Parliament."

(k) Ex parte Stanford, 1 G. & D. 428. S. C. 1 Q. B. 886.† S. C. 9 D. 927, nom. In re Registrar of Births, &c., at Brixton. See the same case cited in R. v. West Riding (J.), 5 Q. B. 5.† See tits. "Quarter Sessions" (Records), "Records."

(l) Ante, p. 12, 16. Ex parte Brady, 8 D. 332. See tit. "Act of Parliament."

tual Court, though the subject-matter be spiritual; because the office itself being matter of *freehold*, is, for that reason, of temporal cognizance. The writ will not be granted at the instance of the deputy himself, he being but an officer at will.(*m*)

*REGISTRAR OF ARCHDEACON.] *Admission*.—The writ will be granted to command an admittance to the office of registrar of an archdeacon.(*n*) [*249]

——. *Return*.—It has been held not to be a good return to a mandamus to admit a registrar, “that an appeal is pending as to the admission,” and “an inhibition from the delegates to do nothing to prejudice the right,” &c.(*o*)

——.] *Restoration*.—The writ lies to restore to the office of registrar of an archdeacon.(*p*)

REGISTRAR OF BISHOP'S COURT.] *Restoration*.—The writ will be granted to restore to the office of registrar of a Bishop's Court.(*q*)

——.] ——. *Deputy, Admission*.—The writ of mandamus lies to command a bishop to admit one duly entitled to the office of deputy registrar of his diocese, it being an office in which the administration of justice is concerned. Thus, where the registrars of a diocese were authorized by their patent of office, (under the bishop's hand and seal,) to appoint a deputy, to be approved of and allowed by the bishop, who, if he should not approve of and allow the deputy named and proposed to him, was empowered to nominate another, with a salary payable out of the profits of the registrarship: the registrars appointed a deputy, subject to the approbation and consent of the bishop, who, on being informed of it, answered, that “for good and sufficient reasons he disapproved of the party nominated,” but declined to specify his reasons; the Court refused

(*m*) R. v. Ward (Dr.), H., 4 Geo. 2; Str. 893; Com. Dig. tit. “Man.” (A.) S. C. Fitzg. 123, 194. S. C. 1 Barn. 252, 294, 380, 411 (the writ was directed to “The Commissary of the province of York,” Ford's MS.; 7 East, 348 b.), citing Keb. 615, where it is said to have been expressly decided that it does not lie to admit a register, Fitzg. 194; 3 Bac. Abr. 531. S. C. R. v. Clapham, 1 Vent. 110. S. C. 1 Lev. 306. R. v. Roberts, 3 A. & E. 776.† See White's case, 6 Mod. 18, per Holt, C. J. R. v. Dr. Bland, 7 Mod. 356, citing R. v. Dr. Ward, supra. See 8 East, 216; 5 Bac. Abr. G. 198; 2 Roll. Abr. 285. Jones v. Mlandaff (Ep.), 4 Mod. 27, 8. Lee's case, Carth. 169. See tits. “Deputy Officer,” “Marches,” “Office” (Deputy), “Proctor.”

(*n*) Ante, p. 12, 178. Lambert's case, Carth. 170. S. C. nom. R. v. Hill, 1 Show. 253, and cases there cited. Trem. 536. See tits. “Archdeacon,” “Office” (Admission).

(*o*) R. v. Dr. Harris, 1 W. Blac. 430. S. C. Burr. 1420. R. v. Ward, Stra. 893; Fitz. 123, 194, 195. See R. v. Chester (Ep.), 1 T. R. 403; Com. Dig. tit. “Man.” D. 4. See tits. “Churchwarden” (Swearing in, Returns), “Inhibition,” “Office” (Admission, Returns).

(*p*) Ante, p. 12. Ruding v. Newell, Stra. 983; Trem. Pl. Cor. 536, where see form of writ. See tit. “Office” (Restoration).

(*q*) Ante, p. 12, 177, 178. Gloucester's case (Ep.), Comb. 264. It was not granted until after some hesitation. See Anon., 12 Mod. 666, per Holt, C. J. R. v. Ward, Stra. 893. Ballard v. Gerrard, 12 Mod. 609; Holt, 442. See tit. “Office” (Restoration).

a rule nisi for a mandamus to the bishop to admit the deputy, the bishop having a discretion which the Court could not force him to exercise in a particular way.(*r*)

REGISTRAR OF CONSISTORY COURT.] *Delivery of Rolls, &c.*—The writ lies to command the registrar of a Consistory Court to deliver over to [*250] him *who as of right should receive them, all the public books, records, and entries relating to such office.(*s*)

REGISTRAR OF ECCLESIASTICAL COURT.] *Restoration.*—The writ also lies to command a restoration to the office of registrar of an Ecclesiastical Court.(*t*) There should, however, be an affidavit that the officer has ecclesiastical jurisdiction.

REGISTRAR OF BEDFORD LEVEL.] See title *Bedford Level (Registrar.)*

REGISTRATION.] *Company.*—See title *Company (Registration.)*

REGISTRATION OF DEED.] See title *Register of Middlesex.*

REGIUS PROFESSOR.] See titles *College (Master;)* *School (Master;)* (*Teacher;)* *University (Regius Professor.)*

REHEARING.] See titles *Courts Inferior (Rehearing;)* *Quarter Sessions (Rehearing.)*

REQUESTS COURT.] See titles *Courts Inferior (Requests Court;)* *London.*

RESIANT.] See titles *Burgess (Admission;)* *Manor (Iert Resiant.)*

RETURNING OFFICERS.] *Appointment.*—The writ lies to command overseers of townships comprised in an union, to meet and appoint a returning officer, to preside at the election of guardians of a parish union.(*u*)

(*r*) Ante, p. 12—15. See Bac. Abr. tit. "Man." C. R. v. Ward, Stra. 893. S. C. Fitzg. 123. R. v. Gloucester (Ep.), 2 B. & Ad. 158;† but see R. v. Hill, 1 Show. 253, where Holt, C. J., says that the writ does not lie for a deputy register, his office being at will. See tits. "Deputy," "Discretion," "Lecturship" (License), "Office" (Admission), "School" (Master, License).

(*s*) R. v. Wheeler, Cas. t. temp. Hard. 98; Cunn. 155, S. C. See tits. "Accounts," "Books," "Company," "Courts Inferior" (Records), "Manor" (Rolls), "Peace" (Clerks of), "Records."

(*t*) Ante, p. 12; Carth. 170. R. v. Ward, Gibb. 193. White's case, 6 Mod. 18; but Holt, C. J., said it was against his will; Com. Dig. tit. "Man." (A.). See Leigh's case, 3 Mod. 335; and see R. v. Morpeth (Bailliffs), Stra. 59; Bac. Abr. tit. "Man." C. See tits. "Ecclesiastical Court," "Office"† (Restoration).

(*u*) R. v. Oldham Union, 16 L. J., N.S. 110, M. C., where see form of writ. See

REVISING BARRISTER'S COURT.] See titles *Burgess Roll*; *Courts Inferior* (*Revising Barrister*); *Quarter Sessions*.

RIOTS.] *Damages*.—The writ lies to command justices to appoint a special Petty Sessions, pursuant to stat. 7 & 8 Geo. 4, c. 31, for the purpose of hearing and determining a claim to compensation for damage, which had been suffered by rioters.(*r*) But in order to entitle a party to require the *holding of such a sessions, it must appear by affidavit, that [*251] within seven days after the commission of the offence, he went before a justice of the peace, &c., and that he also complied with all the other requisites of the statute. The absence of such an affidavit will determine the Court not to grant the writ.(*w*)

The writ also lies to command the Quarter Sessions to hear an appeal against the decision of a special Petty Session, on an application for compensation under stat. 3 Geo. 4, c. 33, for damage done by rioters.(*x*)

—.] *Rate*.—The writ does not lie to command justices to cause a rate to be made and levied for raising and paying the taxed costs of defending actions on stat. 57 Geo. 3, c. 19, s. 38, against the applicants for the recovery of certain damages found to have been sustained by the plaintiffs in those actions, in consequence of certain tumultuous assemblages of persons within the borough, if the borough be not within a hundred, because the relief is confined solely to hundreds aliter, if within a hundred.(*y*)

—.] *Compensation*.—As to compensation for damage done by rioters. See titles *Compensation* (*Rioters*); *Damages*.

ROAD.] See titles *Canal*; *Footway*; *Highway*; *Inclosure*; *Railway*.

RUGBY CHARITY, TRUSTEES OF.] See titles *Charity*; *Institutions, Private*; *Trust*.

RUSSIA COMPANY.] See titles *Company*; *Franchise*; *Freedom* (*Company, Swearing in*).

tits, "Constable" (Appointment), "Guardians of Poor" (Election), "Office," "Parish" (Officers, Election).

(*r*) R. v. Bateman, 4 B. & Ad. 552,† S. C. 1 N. & M. 718.† See tits. "Courts Inferior" (Holding Court), "Manor" (Leet), "Quarter Sessions" (Petty Sessions).

(*w*) Ante, p. 27, 28. See post, tit. "Application" (Affidavits).

(*x*) R. v. Tucker, 5 D. & R. 434.† See tits. "Courts Inferior" (Appeal), "Quarter Sessions" (Appeal).

(*y*) Ante, p. 16. R. v. King's Lynn (J.), 3 B. & C. 147,† S. C. 4 D. & R. 778.† See tits. "Act of Parliament," "Costs," "Damages," "Money," and post, "Application."

SACRAMENT.] *Administration*.—The writ has issued to command the administration of the Sacrament of our Lord's Supper.(:)

As to return of not taking the Sacrament in order (a) to qualify for corporate office.

ST. MARTYN-LE-GRAND, COURT OF.] See titles *Attorney (Restoration)*; *Courts Inferior (Saint Martyn-le-Grand)*.

[*252] *SALARY.] See titles *Lectureship*; *Money*; *Office (Fees, &c.)*; *Parson*.

SAVINGS' BANK.] *Arbitration*.—The writ lies to command the managers, directors, or trustees of a savings' bank, to name and appoint an arbitrator on their behalf, to arbitrate in pursuance of the stat. 9 Geo. 4, c. 92, s. 45, as to matters in dispute between the bank managers and the depositors,(b) because there is no other remedy; for it has been held, that where money belonging to the depositors in a savings' bank had been embezzled, or lost by the default of the officers of the bank, the remedy of the depositors was not by action against the trustees or managers, but by mandamus to compel them to appoint an arbitrator under stat. 9 Geo. 4, c. 92, s. 45.(c) But where by a rule of a savings' bank, no claim for any sum of money could be made after more than seven years from the death of a depositor, the Court discharged a rule nisi for a mandamus to the trustees of such a bank, to appoint an arbitrator under stat. 9 Geo. 4, c. 92, s. 45, to decide a dispute as to the money, the alleged depositor of which had been dead more than seven years; for the Court will not set on foot an inquiry which cannot end in any useful result.(d)

The applicants must shew themselves to be depositors, otherwise the

(z) Cited in *R. v. Patrick*, 2 Keb. 167. But it is said by Windham, J., that this prece lent is not to be followed, for that most likely the writ in that case was, like many others, issued auctoritate Parliamenti on petitions presented to the King and Parliament from the House of Lords, which was then distinct, and a Court of Judicature:—in such cases the King gave present answers *unica voce*, without an act of Parliament. Ante, p. 3, n. (l). See tits. "Bishop," "Chrism," "Confirmation," "Consecration," "Visitation."

(a) Clerk's case, 2 Vent. 247. *R. v. Larwood*, 4 Mod. 269. *R. v. Aldborough (Borough)*, 10 Mod. 100. See tits. "Alderman" (Restoration, Oaths), "Oaths," "Office" (Restoration, Return, Oaths).

(b) See tits. "Act of Parliament," "Arbitration," "Award." *R. v. Witham Savings' Bank*, 1 A. & E. 321, 325,† S. C. 3 N. & M. 416,† *R. v. Cheadle Savings' Bank*, 1 A. & E. 323,† n. (a). S. C. 3 N. & M. 418,† n. (a). *R. v. Mildenhall Savings' Bank*, 6 A. & E. 952,† S. C. 2 N. & P. 278. *R. v. Northwich Savings' Bank*, 9 A. & E. 729,† S. C. 1 P. & D. 477. But see stat. 4 & 5 Wm. 4, c. 40, amending stat. 10 Geo. 4, c. 56, as to Savings' Banks.

(c) Ante, p. 18—25. *R. v. Mildenhall Savings' Bank*, 2 N. & P. 278. S. C. 6 A. & E. 952,† also *R. v. Witham Savings' Bank*, 3 N. & M. 416,† S. C. 1 A. & E. 321,† and *R. v. Cheadle Savings' Bank*, 3 N. & M. 418,† n. (a). S. C. 1 A. & E. 323,† n. (a).

(d) Ante, p. 15. *R. v. Northwich Savings' Bank*, 1 P. & D. 477. S. C. 9 A. & E. 729,† See tit. post, "Application."

writ will be refused.(c) But the Court of B. R. has under stat. 9 Geo. 4, c. 92, s. 45, granted a mandamus to command a savings' bank to appoint an arbitrator to decide between such bank and the applicants, in whose names a deposit has been made, although such deposit had been withdrawn by the person who had made it for the applicants, and notwithstanding the bank rules directed that a duplicate book of the deposits should be delivered by the bank, and be an authority for paying over any sums to the person bringing it to the bank, and though such duplicate was delivered up to the bank when the deposit was withdrawn.(f) The writ will not however be granted for the purpose of deciding upon the claim of persons professing to apply on behalf of a body of depositors, if it be matter of dispute among the depositors themselves, whether or not the applicants are entitled to represent the body.(g)

*SCAVENGER]. The writ lies for the office of scavenger when appointed by act of Parliament, and thereby made a public office.(h)

—.] *Appointment, Duties, &c.*—It has been held, that the writ lies to command an appointment of scavengers. The report of the case is thus, "the Court was moved for the parishioners and officers of the parish of Clerkenwell, to make scavengers, that are elected in that parish, serve the office." Rolle, C. J., answered, "It is marvel that the city of London do not look to this, for they have power by their bye-laws to make men serve such offices. Yet take a mandamus for them to be brought hither to shew cause why they will not execute the office."(i)

—.] *Admission, Swearing in.*—The writ lies to admit a scavenger to his office,(j) and also to swear him to the duties of his office.(k)

SCHOLARSHIP.] See titles *College (Scholarship); University (Scholar.)*

SCHOOL.] This subject is arranged as follows:—

(c) Ante, p. 27, 28. Supra, 1 A. & E. 323,† n. (a). S. C. 3 N. & M. 418,† n. (a); 9 A. & E. 729,† S. C. 1 P. & D. 477. See post, tit. "Application."

(f) R. v. Cheadle Savings' Bank, 1 A. & E. 323,† n. (a). S. C. 3 N. & M. 418,† n. (a). See supra, n. (c), 6 A. & E. 956,† S. C. 2 N. & P. 278, and 1 A. & E. 321,† S. C. 3 N. & M. 416,†

(g) See ante, p. 27, 28. D. v. Witham Savings' Bank, 1 A. & E. 321,† See post, tit. "Application."

(h) See tit. "Act of Parliament," "Churchwarden." See He's case, 1 Vent. 143. Com. Dig. tit. "Man." (A.), also cited in the Case of Parish Issues, Comb. 257. See stats. 2 Wm. & M., st. 2, c. 8, 3 Wm. & M., c. 12, 8 & 9 Wm. 3, c. 37, 6 Geo. 1, c. 6, 18 Geo. 2, c. 33, ss. 2, 3.

(i) Anon., Mich. 1652; Sty. 346, cited in Patrick's case, Raym. 111, nom. The case of the Inhabitants of Clerkenwell, M. 1652.

(j) See R. v. Barker, Burr. 1267, 1268, per Wilmut, J.; also R. v. Evans, 1 Show. 282. City Works' case, 2 Sid. 112. R. v. Morpeth (Bailiffs), Stra. 59, H. 4 Geo. 1. R. v. London (Mayor), 2 T. R. 181. See tit. "Office" (Admission).

(k) Hub. 270, M. 1652, cited in R. v. Patrick, 1 Keb. 834. See tit. "Office" (Swearing in).

Schoolmaster	-	-	-	-	253	Under Master	-	-	-	-	254
License	-	-	-	-	254	License	-	-	-	-	254
Admission	-	-	-	-	254	Restoration	-	-	-	-	255
Restoration	-	-	-	-	254	Usher	-	-	-	-	255
Teacher	-	-	-	-	254	License	-	-	-	-	255
License	-	-	-	-	254	Restoration	-	-	-	-	255
Admission	-	-	-	-	254						

—.] *Schoolmaster*.—It is now clearly established that a mandamus will be granted, at the instance of a schoolmaster of a grammar or other public school, because the office is of a public nature, and has temporal and certain rights annexed to it, for which there exists no other specific legal remedy.^(l) This doctrine was formerly doubted, and a mandamus [*254] for such *an officer has been refused.^(m) The office of schoolmaster has been often stated to be the lowest for which the writ of mandamus will be granted.⁽ⁿ⁾

—.] *License*.—The writ lies to command the licensing of a schoolmaster, duly entitled to such license. But it is a good return, if the candidate be in holy orders, that a reasonable time has not been allowed, wherein to inquire into the propriety of licensing.^(o) So it is a good return to such a writ, that the ordinary has suspended granting his license, until the party would submit himself to be examined “touching his sufficiency in learning,”^(p) or as to his morality and religion.

—.] *Admission*.—So the writ lies to command the due and proper admission of one appointed schoolmaster, to the duties of his office.^(q)

—.] *Restoration*.—The writ will also be granted to restore such a schoolmaster, if improperly removed from his office;^(r) or from the mas-

(l) Ante, p. 12. R. v. Canterbury (Archbishop), 8 East, 217, 218. R. v. Morpeth (Bailiffs), Stra. 58. See Cox's case, 1 P. Wms. 29. R. v. Appleford, 2 Keb. 862. R. v. Dr. Bland, 7 Mod. 356, citing Stamp's case, Ray. 12. S. C. 1 Sid. 40. S. C. 1 Keb. 5, agreed in Hurst's case, 1 Lev. 75. S. C. 1 Keb. 354. R. v. Rushworth, Kel. 287. Middleton's case, 1 Sid. 169. S. C. 1 Keb. 631. R. v. Canterbury (Archbp.), 15 East, 132. R. v. Litchfield, &c. (Ep.), Stra. 1023. S. C. 7 Mod. 217. S. C. 2 Barn. 365, 428. Withnell v. Gartham, 6 T. R. 388, 390. Bae. Abr. tit. “Man.” C. See tits. “College” (Master), “Dissenters” (Minister), “Lectureship,” “Office” (Public), (Fees, Emoluments, &c.)

(m) The Protector v. Craford, Sty. 457. And see R. v. Patrick, 1 Keb. 835. R. v. Kingscleere (Churchwardens), 2 Lev. 18. Com. Dig. tit. “Man.” (A.)

(n) 1 Keb. 354, and 1 Keb. 631, supra. See tits. “Constable,” “Sexton.”

(o) Ante, p. 27, 28. R. v. Morpeth (Bailiffs), T. 3 Geo. 1, Stra. 58, cited in R. v. London (Ep.), 1 Wils. 13. S. C. Stra. 1192. R. v. Litchfield (Ep.), Stra. 1023. S. C. 2 Barn. 365, 428. S. C. Andr. 367. S. C. 2 Kely. 287. See tits. “Bishop,” “Lectureship” (License), “License,” and infra, “Teacher.”

(p) R. v. York (Archbp.), 6 T. R. 490. R. v. Canterbury (Archbp.) 15 East, 132.

(q) R. v. Barker, Burr. 1268. See tits. “College” (Master, Admission), “Dissenters” (Minister, Admission), “Office” (Admission).

(r) Ante, p. 12. Parkinson's case, Comb. 144. R. v. Patrick, 1 Keb. 610. R. v. Litchfield (Ep.), Stra. 1023. S. C. 7 Mod. 217. S. C. 2 Barn. 365, 428. R. v. Rushworth, W. Kel. 287, citing 1 Sid. 169. R. v. Darlington School, 12 L. J., N. S. 124, Q. B. S. C. 6 Q. B. 682, 7 S. C. 14 L. J., N. S. 67, Q. B. where see form of return, &c. R. v. Morpeth (Bailiffs), Stra. 58. See tits. “College” (Master, Restoration), “Dissenters,” “Office” (Restoration).

tership of a free school,(s) but not if the governors have a discretionary power of amotion.(t)

—.] *Teacher; License*.—The writ also lies to command the granting of a license to teach in a grammar, or other public school.(u) But it is a good return to such a writ, that the license is suspended, until a submission to examination “touching his sufficiency in learning.”(v)

—.] *Admission*.—So the writ lies to command the admission of a teacher to his office, on a suggestion of his due election, and of the demand and refusal.(w)

—.] *Undermaster; License*.—So the writ lies to command the granting of a license to the undermaster of a public school.(x)

*—.] *Restoration*.—So the writ lies to command restoration to such an office,(y) on illegal deprivation. [*255]

—.] *Usher*.—The writ will not be granted where the place is one of mere service, as usher of a private school;(z) but for the usher of a grammar or other public school, it will lie, although he be not a sworn officer, if the office have certain and temporal rights annexed to it.(a)

—.] *License*.—The writ lies to command the granting of a license to one duly elected usher of a free grammar school.(b) But the party who licenses may take a reasonable time to inquire as to the character of the party asking the license,(c) and may, therefore, return that he is inquiring into the truth of an accusation, on a caveat.(d)

(s) *Hermitage's case*, Comb. 210. *Harcourt v. Fox*, Comb. 213. *Northampton's case*, Loftt, 549. See tit. “College.”

(t) Ante, p. 12—15; Comb. 210, supra. See tit. “Office” (Restoration).

(u) *R. v. York* (Archbp.), 6 T. R. 490. *R. v. Kendall*, 1 Q. B. 376,† S. C. 4 P. & D. 602. *R. v. Canterbury* (Archbp.), 15 East, 132. See tits. “Lectureship” (License), and supra, “Schoolmaster” (License).

(v) 6 T. R. 490, supra, n. (p).

(w) Ante, p. 12. *R. v. Barker*, 1 W. Blac. 299, 351. S. C. Burr. 1265. See supra, “Schoolmaster,” and post, tit. “Application” (Demand and Refusal).

(x) *R. v. Rushworth*, W. Kel. 287. See supra, “Schoolmaster” (License), “Teacher” (License), and tit. “Lectureship” (License).

(y) Ante, p. 12. *R. v. Morpeth* (Bailiffs), T. 3 Geo. 1, Stra. 58. Com. Dig. tit. “Man.” (A.) See tit. “Office” (Restoration), and supra, “Schoolmaster” (Restoration).

(z) Ante, p. 12. *R. v. Raines*, 3 Salk. 233, 11. *Pollice's case*, cited in 2 Barn. 365. See supra, “Schoolmaster,” and tit. “Office” (Public).

(a) Ante, p. 12. Per Glyn, C. J., in *City Works' case*, 2 Sid. 112. *Stamp's case*, 1 Sid. 40. S. C. Raym. 12. *Middleton's case*, 1 Sid. 169. *The Protector v. Craford*, Sty. 457. *R. v. Morpeth* (Bailiffs), Stra. 59. Com. Dig. tit. “Man.” (A.) Bac. Abr. tit. “Man.” C. See tits. “Lectureship,” “Office” (Sworn officer).

(b) *R. v. Litchfield* (Ep.), 7 Mod. 217. S. C. Kel. 287. S. C. Stra. 1023. S. C. 2 Barn. 365, 428. S. C. Andr. 367. S. C. Com. 448. *R. v. Cory*, 3 Keb. 855. S. C. 2 Lev. 222. And see 1 Vent. 41. *Tatler v. Reynolds*, M. 10 Wm. 3, cited in 2 Barn. 365. In *R. v. Wallis*, T. 12 Geo. 1, Parker, C. J., and Powis and Eyre, JJ., held it would lie; Pratt contra: and the Court said there were several authorities in Styles, since that case, that a mandamus would lie as above, and said that of late mandamuses had been carried much further than formerly. See tit. “Lectureship” (License). See supra, “Schoolmaster” (License), “Teacher” (License), “Under Master” (License).

(c) 7 Mod. 217, supra. S. C. Stra. 1023. Com. Dig. tit. “Man.” D. 3. Supra, “Schoolmaster” (License), p. 254.

(d) Supra, p. 254, n. (o).

——.] ——. *Restoration*.—The writ will also be granted to command restoration to the office of usher,^(e) but not if there be visitors, and they have removed him;^(f) or where he is appointed *durante bene placito* merely.^(g)

SCHOOLMASTER.] See titles *College (Master)*; *School (Schoolmaster)*; *University*.

SCRIVENERS' COMPANY.]—*Admission*; *Swearing in*.—The writ lies to command the Scriveners' Company to admit and swear in one duly entitled to its freedom, in order that he may become and practise as a notary.^(h)

[*256] *SEAL AFFIXING.] See titles *Administration (when granted)*; *College*; *Corporation (Municipal)*; *Hospital*; *Recorder (Election)*; *University (High Steward)*.

SECONDARY OF CLERK OF THE CROWN.] *Swearing in*.—The writ has been granted to command a swearing in to the office of Secondary of the Clerk of the Crown.⁽ⁱ⁾

SECOND CURATE.] See titles *Curate*, p. 113, n. (g); *Office (known to the Laic)*, p. 175, n. (g).

SECRETARY OF THE COURT OF MARCHES.] See title *Marches*.

SERJEANT.] The writ lies for the office of serjeant of a municipal corporation.^(j)

SERJEANT OF THE MACE.] *Swearing in*.—The writ lies not in gen-

(e) Ante, p. 12. R. v. Patrick, 1 Keb. 610. S. C. Raym. 111. R. v. Rushworth, Kel. 287, citing 1 Sid. 169. See tit. "Office" (Restoration), and supra, "Schoolmaster" (Restoration), "Under Master" (Restoration).

(f) R. v. St. Catharine Hall, 4 T. R. 235. And see Dr. Witherington's case, 1 Keb. 2, 59, &c. S. C. 1 Lev. 23. S. C. Sid. 71. See tits. "College" (Visitor), "Visitor."

(g) Ante, p. 12. The Protector v. Craford, Sty. 457. Stamp's case, 1 Keb. 5. S. C. Raym. 12. Bagg's case, 11 Rep. 93 b. Coveney's case, Dyer, 209. See tits. "Office" (Freehold), "Recorder" (Restoration).

(h) Ante, p. 12. R. v. Scriveners' (Society) 1 G. & D. 641. Scriveners' Company v. R., 3 G. & D. 272. S. C. 3 Q. B. 939;† 6 & 7 Vict. c. 90, as to notaries public. R. v. Scriveners' Company, 10 B. & C. 511. S. C. 5 M. & R. 543. In re Taylor, 5 B. & A. 538.† See tits. "Company," "Franchise," "Freedom" (Company, Swearing in), "Freeman," "Office" (Admission, Swearing in).

(i) Ante, p. 12; cited in Townsend's case, 1 Keb. 458. See tit. "Office" (Swearing in).

(j) 3 Roll. Abr. 456, l. 20, 32. Com. Dig. tit. "Man." (A.) See tit. "Corporation Municipal," "Office," "Serjeant of Mace."

As to the election of serjeant, see stat. 6 & 7 Vict. c. 89, App., the requisitions of which should be followed. This statute has not been extended to Ireland. See stat. 19 Geo. 2, c. 12 (I.), App.



eral to swear in a (*serviens ad clavam*), serjeant of the mace to his office, because usually he is but an officer dative and removable at the pleasure of the mayor, like the clerk of the waterworks in London. (*k*)

—.] *Restoration*.—But afterwards the Court commanded the mayor of Bodmin to restore the serjeant-at-mace, upon a suggestion that it was an office for life, and not a mere voluntary employment. (*l*)

—.] *Delivery of Mace, &c.*—If on the discharge of a serjeant of mace he refuse to deliver up the mace to his successors, yet a mandamus has been refused to compel him so to do. (*m*)

SEVERN, WATER BAILIFF OF.] *Restoration*.—The writ has been denied to command the restoration of the water bailiff of the river Severn to his office, although a patent officer; Holt, C. J., when refusing the writ, said, “that he was not for granting a mandamus where an assize lieth,” (*n*) but it is *apprehended that at this day, the remedy [*257] by assize having fallen entirely into desuetude, it would in such case be granted. (*o*)

SEWERS.] *Expenditor, Exemption*.—The writ has been granted to exempt the archdeacon of Rochester from being expeditor to commissioners of sewers, it being a secular office and inferior to his degree. (*p*)

—.] As to sewers see title *Drainage*.

SEXTON.] The writ of mandamus does not lie for a place of mere service or employment, but for an office as that of sexton it does lie; (*q*) although the writ has been granted for this office ever since the time of Lord Holt, (*r*) yet it has been confessed to be the lowest in the scale of offices for which the writ has been awarded. (*s*)

This subject is arranged as follows;—

(*k*) Ante, p. 175, 176. R. v. Winter, 2 Keb. 134, which was as to the serjeant of Stafford. R. v. Dartmouth (Mayor), 3 Salk. 229. Bac. Abr. tit. “Man.” (D.); 2 Roll. Abr. tit. “Restitution,” pl. 7.

(*l*) Ante, p. 175. R. v. Barnard, 2 Keb. 402, but Twisden, J., doubted, because he was no officer of government, but like the clerk of the Waterworks in London. Anon., Comb. 287; 3 Salk. 229, 2, where see a return. See tits. “Corporation” (Municipal), “Office,” “Swordbearer.”

(*m*) R. v. Todd, 2 Jur. 565. See tit. “Insignia.”

(*n*) Ante, p. 5, n. (*h*), 19, 20, n. (*q*). River Severn’s case, Comb. 347. See tit. “Office” (Public).

(*o*) See ante, p. 5, n. (*h*), and tit. “Office.”

(*p*) Dr. Lee or Warner’s case, 2 Keb. 693, citing 2 Inst. 3. See tits. “Drainage,” “Expenditor,” “Office.”

(*q*) Ante, p. 12. R. v. Raines, 3 Salk. 233, 13, also cited in R. v. Canterbury (Archbishop), 8 East, 218. Vide Burn’s Eccl. Law, 319, tit. “Sexton.” Isle’s case, Ray. 211, S. C. 1 Vent. 143. S. C. Id. 153. S. C. 2 Lev. 18. S. C. March. 101, cited in R. v. Dr. Bland, 7 Mod. 356. See also Oliver v. Ingram, 7 Mod. 267. S. C. Stra. 1114, where the law as to sextons is fully discussed. R. v. Morpeth (Bailiffs), Stra. 58. R. v. Stoke Damerel (Minister), 1 N. & P. 56.† S. C. 5 A & E. 584.† See tits. “Office,” “Schoolmaster,” ante, p. 254, n. (*n*).

(*r*) R. v. London (Aldermen), 2 Barn. 398. Nat. Brev. 218.

(*s*) R. v. Appleford, 2 Keb. 862. See tits. “Constable,” “Office” (Ministerial, Inferior), “School,” (Schoolmaster.)

SEXTON					SEXTON—Swearing in	-	-	-	257
Election	-	-	-	-	Restoration	-	-	-	257
Admission	-	-	-	-	Returns	-	-	-	258

—.] *Election*.—The writ lies to command the minister and churchwardens of a parish to convene a meeting within the parish, for the purpose of electing a proper person to fill the office of sexton.(*t*)

—.] *Admission*.—After the election of a sexton, the writ lies to command his admission to his office.(*u*)

—.] *Swearing in*.—The writ lies to swear him into his office.(*v*)

—.] *Restoration*.—The writ lies also to command churchwardens, &c. to restore to the office of parish sexton on unjust deprivation, it being a freehold, and the duty of the officer being to take care of the church. It was not until after time taken by the Court to consider whether any precedents would warrant the writ in such a case, that it was granted; it was much doubted at first, as it was contended, that a sexton was rather [*258] a servant, than an *officer who has a freehold in his office.(*w*) The older cases shew that on the application for the writ, there was usually produced to the Court a certificate from the minister and some of the inhabitants of the parish, of the existence of a custom to choose a sexton, whose appointment was for life, and of the fees attached to the office as that he should have two pence per year for every house within the parish. But such certificate is now dispensed with,(*x*) it having been settled that if it appear, that the office is elective, and has certain customary perquisites as freehold, as in some cathedrals, the writ will be granted, but otherwise not.(*y*) Thus, if the sexton by virtue of his office gather all the toll, he will be restored, but not so where he is a mere servant, or there is no suggestion of any of the above special facts, for in the latter case the Court will consider it to be a place at will merely.(*z*)

—.] *Returns*.—A return to a mandamus to restore to the office of sexton, alleged that the prosecutor was not duly elected and sworn sexton

(*t*) R. v. Stoke Damerel, 1 N. & P. 56.† S. C. 5 A. & E. 584.† S. C. 2 H. & W. 346, cited in R. v. Birmingham (Rector), 7 A. & E. 257.† See tits. "Churchwarden," "Office" (Election,) "Parish."

(*u*) Cited in R. v. Barker, Burr. 1267. Nightingale v. Marshall, 3 D. & R. 549.† See tit. "Office" (Admission).

(*v*) March. 101; 2 Roll. Abr. 234, l. 35, Com. Dig. tit. "Man." (A.) Anon., 7 Mod. 118. See tits. "Oaths," "Office," (Swearing in), and ante, p. 12.

(*w*) Ante, p. 12. Isle's case, Raym. 211; 1 Vent. 143, (cited and approved in 2 T. R. 183, n. (*b*), 153. S. C. 2 Keb. 802. S. C. cited in Olive v. Ingram, 7 Mod. 267, H. 32, H. 6, 31. Sexton may be a parson, 2 Keb. 807, 820, S. C. S. C. 2 Lev. 18, nom. R. v. Kingscleere (Churchwardens). Isle's case, cited in R. v. Rushworth, Kel. 287, and in R. v. Blooe, Burr. 1044. Com. Dig. tit. "Man." (A.) See R. v. Sir Rich. Raines, 3 Salk. 233, 13, 15. R. v. Taunton (Churchwardens), 1 Cowp. 413. Anon., Freem. 21. R. v. London (Mayor), 2 T. R. 182, n. (*b*). Bac. Abr. tit. "Man." C. See tit. "Office" (Restoration).

(*x*) R. v. Kingscleere (Churchwardens), 2 Lev. 19. See tit. "Custom."

(*y*) Isle's case, 2 Keb. 806, per Hales, C. J., the whole Court agreeing. See also R. v. Stoke Damerel (Minister), 1 N. & P. 56.† S. C. 5 A. & E. 584.† S. C. 2 H. & W. 346. See tit. "Office," (Fees, &c.)

(*z*) Supra, n. (*b*); and see R. v. Raines, 3 Salk. 233, 13, 15. See tits. "Guardians of Poor" (Clerk), "Office."

according to the ancient custom of the parish, and secondly, that there was a custom of the inhabitants, &c. to elect and remove at pleasure, and that the prosecutor was so removed pursuant to such custom; which returns were held good, and not inconsistent.(a)

SHARES.] See title *Company (Shares, Calls)*

SHERIFF.] Swearing in.—The writ lies to swear in a sheriff to his office.(b)

——.] *Duties, &c.*—A performance of all those legal duties of a sheriff, for the neglect of which there is no specific legal remedy, may be commanded by mandamus.(c)

——.] *Delivery of Rolls, &c.*—The writ also lies to command the ex-sheriffs to deliver over all official rolls, &c., to the new ones.(d)

*——.] *Compensation.*—As to compensation for loss of fees, [*259] see title *Compensation (Sheriff)*.

——.] *Sheriffs' Court.*—As to Sheriffs' Court, see titles *Courts Inferior (Sheriffs' Court)*; *Sheriffs' Court*.

SHERIFFS' COURT.] See titles *Courts Inferior (Sheriff's Court)*.

SHERIFFS' COURT, LONDON, JUDGE OF.] Swearing in.—The writ has been granted to command the swearing in of the Judge of the Sheriffs' Court, London, the election and nomination of whom is in the common council, and not in the lord mayor or sheriffs.(e)

SHIP.] Registration.—The writ lies on a proper case to command the registry of vessels as British vessels.(f)

——.] *Certificate of Registration.*—The writ will also be granted to command the due granting of a certificate of the registry of a transfer of a ship, pursuant to stat. 34 Geo. 3, c. 68.(g) if all proper parties have joined in the transfer thereof,(h) and the ship should of course be registered.(i)

(a) R. v. Taunton (Churchwardens), Cowp. 413. Com. Dig. tit. "Man." D. 3. See post, tit. "Return."

(b) Ante p. 12. Papillon's case, Skin. 64, where see as to how the writ should be directed. R. v. Woodrow, 2 T. R. 732. And see Scarborough's case, Stra. 1180; Trem. Pl. Cor. 452, where see form of writ. See tit. "Office" (Swearing in).

(c) See tits. "Compensation" (Assessing), "Office" (Duties, &c.)

(d) Sheriff of Nottingham's case, 12 Car. 2, B. R. Hurst's case, 1 Keb. 387. See tits. "Books," "Company," "Corporation" (Municipal), "County," "Records."

(e) Ante, p. 12. Thompson v. Goodfellow, 2 Show. 173, citing Proctor v. Philip. Hardr. 311, 327. See tits. "Bristol," "Courts Inferior" (Sheriffs' Court), "Office" (Swearing in), "Sheriffs' Court."

(f) R. v. Arnaud, 16 L. J., N. S. 50, Q. B., where see form of writ and return. See tits. "Customs," "Office" (Enforcing Duty, &c.), "Registers of Middlesex."

(g) R. v. Customs (Collector), 2 M. & S. 223. R. v. The Customs (Collector), 1 M. & S. 261. See tits. "Act of Parliament," (Certificate), "Customs."

(h) Ante, p. 27, 28; 2 M. & S. 223, supra.

(i) 1 M. & S. 261, supra, n. (g).

SIDESMEN.] *Election*.—The writ lies to command a notice to be given to hold a meeting for the purpose of electing sidesmen,^(j) for the year ensuing.^(k)

——.] *Swearing in*.—The writ lies also to command the swearing in of a sidesman.^(l)

——.] *Rule*.—It is admitted that the rule is absolute in the first instance, in analogy with the practice as to churchwardens.^(m)

SISTER.] See titles *Hospital (Sister, Restoration)*; *Office*; *Visitor*.

[*266] *SKINNERS' COMPANY, ASSISTANT OF.] The writ has been granted for the assistant of company as the Skinners' Company.⁽ⁿ⁾

SOUTHWARK, BOROUGH COURT OF.] See titles *Attorney*; *Corporation Municipal (Duties)*; *Courts Inferior (Southwark)*.

SPIRITUAL COURT.] See titles *Courts Inferior (Spiritual Courts)*; *Courts Superior*; *Office*; *Proctor*; *Registrar*.

STALL.] See titles *Bishop*; *Canon*; *Cathedral Stall*; *Dean*; *Prebendary*.

STANNARIES COURT.] See titles *Courts Inferior (Stannaries Court, Hearing)*.

STATUTE DUTY.] See title *Highway (Statute Duty)*.

STEWARD.] *Restoration*.—The writ has been granted to restore to the office of steward of a city corporation^(o) or Court.^(p)

——.] *High, Swearing in*.—The writ lies to command the swearing in of a high steward, for he is a public officer.^(q)

(j) For the nature of this office, and for the origin of the term Sidesmen or Synodsmen, see Burn's Eccl. Law, tit. "Churchwarden." And see tits. "Office," "Parish" (Meeting).

(k) R. v. St. James, Westminster (Churchwardens), 5 A. & E. 391,† also cited in Campbell v. Maund, 5 A. & E. 876.† See tits. "Churchwarden" (Election), "Office" (Election), "Overseers."

(l) R. v. Middlesex (Archdeacon), 3 A. & E. 615.† S. C. 5 N. & M. 496.† Ex parte Duffield, 3 A. & E. 617.† See tits. "Churchwarden" (Swearing in), "Office" (Swearing in), "Overseers."

(m) Ex parte Winfield, 3 A. & E. 614.† Ex parte Duffield, 3 A. & E. 618.† S. C. 6 N. & M. 865.† See tits. "Churchwarden" (Swearing in, Rule). See post, tit. "Rule."

(n) R. v. Oxenden, 1 Show. 219. See tits. "Company," "Franchise," "Freedom" (Company), "Office."

(o) R. v. Halse, 1 Keb. 20. See tits. "Colchester," "Reading" (Steward), "Stratford-upon-Avon" (Steward).

(p) See tits. "Bristol," "Manor" (Steward of Leet), "Office" (Public).

(q) See supra, n. (o), (p). Anon., M. 1652, Sty. 355; Com. Dig. tit. "Man." (A.); also cited in the Protector v. Crawford, Sty. 458. See tits. "Colchester," "Office," "University" (High Steward).

STEWARD OF COURT BARON.] See title *Manor (Baron Steward)*.

STEWARD OF COPYHOLD COURT.] See title *Manor (Copyhold Court)*.

STEWARD OF COURT LEET.] See title *Manor (Leet Steward)*.

STIPENDIARY CURATE.] See titles *Curate (Stipendiary)*; *Salary*.

STRATFORD-UPON-AVON, STEWARD OF.] *Restoration*.—The writ does not lie to restore the steward of Stratford-upon-Avon, it being but an office *durante bene placito*.(r)

SURGEON.] See titles *Hospital (Surgeon)*; *Office (Public)*.

SURGEONS' COMPANY.] See titles *Apprentice*; *Freedom*; *Hospital*.

*SURVEYORS OF HIGHWAYS.] See title *Highways (Sur- [261] veyor)*.

SURVEYOR OF NEW RIVER.] See title *New River Water (Surveyor)*.

SWORDBEARER.] *Restoration*.—The writ lies to restore to the office of swordbearer of a municipal corporation.(s)

TAXATION OF COSTS.] See titles *Compensation (Costs)*; *Costs*; *Mandamus (Costs)*.

TEACHER.] See titles *College*; *School (Teacher)*; *University*.

THAMES COURT OF CONSERVANCY.] See title *Courts Inferior (Thames Conservancy)*.

TITHE.] *Modus*.—The Court will grant the writ to command, the prosecution of an inquiry as to the existence of a modus, under an inclosure act.(t)

But where a tithe commissioner, during the pendency of a suit for the recovery of tithes, had proceeded to inquire as to the validity of a modus,

(r) *Dighton v. Stratford Corp.*, 1 Sid. 461. See tits. "Colchester" (High Steward of), "Office" (Freehold), "Reading" (Steward), "Steward," "Town Clerk" (Restoration, Returns), and ante, p. 12.

(s) *R. v. Bristol (Mayor)*, 1 Show. 228, the return^d being "absence and non-attendance on the mayor in diversis progressibus suis per, &c." S. C. Comb. 145. S. C. Carth. 199. Bac. Abr. tit. "Man." C. See tits. "Office," "Serjeant of Mace," and ante, p. 198.

(t) *Anon.*, 2 Chit. 251. See tit. "Inclosure." The rule in such a case has been directed to be served on the vicar and impropriator. See post, tit. "Rule" (Service).

under stat. 6 & 7 Wm. 4, c. 71, s. 45, but had declined to make his award until the tithe suits should be at an end, the Court refused, under the circumstances disclosed by the case, to command him, by mandamus, to make his award.(u)

—.] *Compensation*.—The writ does not lie to command the summoning of a compensation jury, in order to assess damage for loss of tithe sustained by a rector or vicar, by reason of land having been converted to a purpose which rendered it incapable of producing tithe, unless the case be especially within an act of Parliament, &c.; because such rector or vicar is not interested in the land out of which the tithe arises,(v) but in the latter only when produced.

—.] *Case*.—As to a mandamus to state a case, in pursuance of stat. 6 & 7 Wm. 4, c. 71, ss. 37, 45.(w)

TITLE.] See titles *Dignity; Knight; University (Academical Degrees)*.

[*262] **TIVERTON, TWENTY-FOUR MEN OF.]* As to the office of one of the twenty-four men of Tiverton, see tit. *Ashburton (Eight Men of)*.

TOLERATION ACT.] The writ has been granted, on several occasions, to command justices to administer to one duly entitled the oaths, and to permit him to subscribe the declaration required by the Toleration Act, 1 Wm. & M. st. 1, c. 18.(x)

TOLLS.] See titles *Canal Company (Tolls); Highway (Tolls)*.

TOLT.] See title *Courts Inferior (Tolt)*.

TOLZEY COURT OF BRISTOL.] See titles *Bristol; Courts Inferior (Tolzey Court)*.

TOWN CLERK.] The writ lies for the office of town clerk, because it is both public, and prima facie a freehold.(y)

(u) In re Tithe Commissioners, 1 D., N. S. 810. See tits. "Act of Parliament," "Award."

(v) Ante, p. 27, 28. R. v. Nene Outfall, 9 B. & C. 882,† also cited in R. v. London Dock, 5 A. & E. 173, 175.† See tits. "Act of Parliament," "Compensation."

(w) R. v. Tithe Commissioners, 12 L. J., N. S., 109, Q. B. See tits. "Act of Parliament," "Case," "Courts Inferior" (Case), "Quarter Sessions" (Case).

(x) R. v. Denbysh. (J.), 14 East, 284. R. v. Gloucestersh. (J.), 15 East, 582. And see tits. "Alderman" (Restoration, Return), "Allegiance" (Oath of), "College," "Oaths," "Office" (Restoration, Return, Oaths).

(y) Ante, p. 12. Awdley's case, Poph. 176. S. C. Latch. 123. S. C. Noy, 78. Dighton's case, 1 Vent. 77, 82. R. v. Campion, 1 Sid. 14. The Protector v. Craford, Sty. 457. Com. Dig. tit. "Man." (A.) R. v. New River, 1 Keb. 630, citing Boston Clerk's case. R. v. Hereford, 1 Keb. 716. S. C. 1 Sid. 209. See Stamp's case, Raym. 12; Bac. Abr. tit. "Man." (C.), and tit. "Office" (Freehold).

This subject is arranged as follows:—

TOWN CLERK.					TOWN CLERK.—Restoration	- 263
Election	-	-	-	- 262	Returns	- - - 264
Admission and Swearing in	-	-	-	- 262	Records, &c.	- - - 264
Returns	-	-	-	- 262	Delivery	- - - 264

—.] *Election*.—The writ lies to command an election of a town clerk; and it would seem, that to such a mandamus, a *return* “that before the arrival of the writ, one (J. S.) was duly chosen and sworn into the said office,” is good.(z)

—.] *Admission and Swearing in*.—The writ also lies to command an admission and swearing in to the office of town clerk.(a)

*The writ lies also to admit, after the death of B., a town clerk who was elected to the office as reversioner, after the death of B. (b) [*263]

—.] *Returns*.—To a mandamus to admit, it is not a good return, that the prosecutor had not taken the oaths before the mayor, according to the stat. 13 Car. 2, c. 1, for he might have taken them before two justices; but to an officer who is bound to take the oaths, it is no excuse that they were not tendered to him.(c) Nor is it a good return that he is not qualified to act.(d)

—.] *Restoration*.—The writ also lies to command restoration to the office of town clerk after illegal deprivation.(e)

The writ has also been granted to command restoration, or rather ad-

(z) Ante, p. 12. R. v. Chapman, 6 Mod. 152, and cases there cited. See stat. 6 & 7 Vict. c. 89, App., as to proceedings necessary to be taken previously to an application for a mandamus to proceed to an election of any corporate officer in any of the boroughs in that act mentioned: this act does not extend to Ireland. See tit. “Office” (Election), and post, tit. “Return.”

(a) Ante, p. 12. R. v. Hereford (Mayor), 6 Mod. 309. S. C. 2 Salk. 701. Town Clerk of Oxon’s case, Comb. 244. See Patrick’s case, Raym. 111. R. v. Knapton, 2 Keb. 445, in which case the defendants refused to swear him without payment of a fee. And see Latch. 123, Awdley’s case. 5 Com. Dig. tit. “Man.” D. 5. R. v. Slatford, 5 Mod. 316. S. C. 2 Salk. 428. S. C. Comb. 419. S. C. Holt, 438. R. v. Oxford, (Mayor), 2 Jones, 121; Trem. Pl. Cor. 456, where see a form of writ. See tits. “Aldermen,” “Councilmen.”

(b) Awdley’s case, Poph. 176. S. C. Latch. 123. S. C. Noy. 78; Com. Dig. tit. “Man.” (A.), and see infra, “Restoration.” As to an office in fieri, ante, p. 113, n. (g), 175, n. (i).

(c) Ante, p. 187, n. (p). R. v. Slatford, 5 Mod. 316. S. C. 2 Salk. 428. S. C. Comb. 419. S. S. Holt, 438. R. v. Oxford (Mayor), 2 Jones, 121. See tits. “Oaths,” “Office,” (Restoration, Return, Oaths).

(d) Ante, p. 72, n. (c). R. v. Slatford, supra. See tits. “Churchwarden” (Swearing in, Returns), “Office” (Admission, Return, Not qualified).

(e) Ante, p. 12. Awdley v. Joy, Poph. 176, in which cases are cited of similar writs having been granted, an. 16 Eliz.; it is there also stated by Fennor, J., that a like writ of restitution was granted in 43 Eliz. S. C. Latch. 123. S. C. Noy. 78. R. v. Hereford, 1 Keb. 655. S. C. 1 Sid. 209. R. v. Gloucester (Mayor), 2 Show. 504. S. C. 1 Roll. 409. S. C. 1 Bulst. 189. R. v. Durham (Corp.), 10 Mod. 146. Dighton v. Stratford (Corp.), 2 Keb. 641, 656. S. C. 1 Vent. 77, 82. S. C. 1 Lev. 291. S. C. Raym. 188. S. C. 1 Sid. 461. See Stamp’s case, Raym. 12. R. v. Oxon (Mayor), 2 Salk. 428. Anon., 1 Sid. 255, 257. Verrior v. Sandwich (Mayor), 1 Sid. 305. Campion’s case, 1 Sid. 14. S. C. 2 Sid. 97. R. v. Axbridge (Mayor), Cowp. 523. See The Protector v. Craford, Sty. 457, citing Pasch. 2 Car., Latch. 124. Co. Litt. 233. See tit. “Office” (Restoration.)

mittance, to the office of town clerk, to which the applicant had been appointed remainderman, the office having fallen into possession, but to which he had never been admitted. (*f*)

So the writ to restore, &c. was granted where a town clerk had been elected alderman, in order to oust him of his office of town clerk, the offices being *incompatible*. (*g*) So, where the town clerk had been improperly elected mayor. (*h*)

*The writ does not, however, lie to restore a town clerk, removed [*264] able "ad libitum." (*i*) Nor will the Court restore such an officer, if it be confessed that he was rightly, though informally, removed. (*j*) Nor after he has neglected the duties of the office, because that is sufficient cause both of removal and return. (*k*)

—.] *Returns*.—A return to such a mandamus, that the prosecutor was annuatim eligibilis, is not good, inasmuch as the office is *prima facie* one for life, (*l*) unless restrained by charter or prescription, which ought to be shewn on the return; besides, although the prosecutor might be annuatim eligibilis, yet he will continue town clerk until another be chosen. If, however, the return had been "eligibilis pro uno anno tantum," it would have been good; for the office would have expired at the end of the year, whether another chosen or not. (*m*) A return of an authority to grant, and an appointment to the office, *durante bene placito*, or *ad libitum*, and a subsequent removal, is good; notwithstanding no cause of removal be returned, and the party deprived have not been summoned to answer; (*n*) because the office is a merely ministerial one; but after

(*f*) Awdley's case, Poph. 176. S. C. Latch. 123. S. C. Noy, 78. *Supra*, n. (*b*) (*e*), in which case Whitlock and Jones, JJ., stated, that in the case of one Constable, 10 Eliz., it was resolved that the Court had power of restitution, and cited Mittlecott's case, whereupon Noy (Counsel) said, that there were precedents to prove this in the times of Edw. 2, Edw. 3, and Hen. 6; upon which it was remarked by the Justices, that "they (the Justices) are the chief conservators of the peace within the realm, and therefore have power, for the preservation of the peace in such factious towns (Coventry), to grant restitution." See note to Middleton's case, 2 Dyer, 332 b, 333, pl. 28.

(*g*) See ante, p. 197, n. (*c*). Boston's case, cited in Awdley's case, Latch. 123. S. C. Poph. 176. R. v. Godwin, 1 Doug. 397. See Milward v. Thatcher, 2 T. R. 81, and the cases there cited. See tit. "Office." (Restoration, Return, Incompatible Office).

(*h*) Verrior v. Sandwich (Mayor), 1 Sid. 305; 2 Keb. 92; Bac. Abr. tit. "Office," (K.). See ante, tit. "Mayor."

(*i*) Ante, p. 176. R. v. Campion, 1 Sid. 15; 1 Vent. 77, 82; *supra*, n. (*e*); Com. Dig. tit. "Man." (A. B.). Dighton's case, Raym. 183. S. C. 1 Lev. 291. S. C. 1 Vent. 77, 82. S. C. 1 Sid. 461. S. C. 2 Keb. 641, 656. (Blaggrave's case, 2 Sid. 49, 72, was not argued). Warren's case, Cro. Jac. 540. See tit. "Office" (Freehold).

(*j*) Ante, p. 191, 192, n. (*c*). R. v. Axbridge (Mayor), 1 Cowp. 523. See tit. "Office" (Restoration).

(*k*) Ante, p. 192, n. (*d*); 1 Sid. 14; *supra*, n. (*e*); 1 Mod. 287. Vide 1 Inst. 1. the rule in Norfolk's case, 39 Hen. 6. Bagg's case, 11 Rep. 99 a. See tit. "Office" (Restoration).

(*l*) 10 Mod. 146, *supra*. Dighton's case, 1 Vent. 82. See Co. Litt. 110; 1 Lev. 262; Cro. Car. 110. See post, "Office" (Restoration Return).

(*m*) 10 Mod. 146, *supra*; 1 Sid. 33. See tit. "Custom," and post, tit. "Return."

(*n*) Ante, p. 176, n. (*t*). Dighton's case, 1 Vent. 77. S. C. 2 Keb. 641, 656. S. C.

admission into a judicial office, as an alderman, &c., whose office concerns judicature, there cannot be a removal without cause, and a custom so to remove, is bad.(o) A return that a mayor, for the time being, may elect a town clerk, is good, which, in effect, is a power to the newly elected mayor, to remove at his pleasure the town clerk for the time being.(p) But if the power be to choose a town clerk, with a proviso that he may be turned out at will and pleasure, yet it has been held, that he cannot be deprived without cause and summons.(q)

—.] *Records, &c., Delivery.*—The writ of mandamus will be granted to command a town clerk to deliver to his successor in office all records, &c., for they concern public justice.(r)

*TOWN COUNCILLOR OR COUNCILMAN.] See titles *Councillor*; *Office*. [*265]

TRADE MARK.] See title *Corporation, Trading (Trade Mark.)*

TRADING CORPORATION.] See title *Corporation, Trading.*

TREASURER OF COUNTY.] See titles *County (Treasurer)*; *Office*.

TREASURER OF GUARDIANS OF POOR.] See title *Guardians of Poor (Treasurer.)*

TREASURER OF NEW RIVER.] See title *New River Water (Treasurer.)*

TREASURY, LORDS OF.] Although there are circumstances, as in cases of compensation,(s) under which a mandamus will lie against the lords of the treasury, yet their lordships in their official capacities have been erroneously considered to be within the general jurisdiction of the writ, and a much misunderstood instance is the case of *R. v. Treasury Lords*.(t) in

1 Sid. 461. S. C. 1 Lev. 291. S. C. Raym. 188. Warren's case, Cro. Jac. 540. *R. v. Campion*, 1 Sid. 14, 15. Com. Dig. tit. "Man." (B.) *R. v. Slatford*, 5 Mod. 316, and cases there cited. Bac. Abr. tit. "Man." (C.) See tit. "Office" (Freehold, Restoration, Returns).

(o) Ante, p. 39, n. (l), 101, n. (x), and infra, n. (q). Awdley's case, Poph. 176, supra. See tits. "Alderman" (Restoration, Returns), "Councilman" (Restoration, Returns), "Office" (Restoration.)

(p) Supra, n. (i). *R. v. Campion*, 1 Sid. 14, 15. See tit. "Office," (Freehold.) (q) Supra, n. (i). Dighton's case, 1 Vent. 82, per Twisden, J. But see tit. "Office" (Freehold, Restoration).

(r) Nottingham case, 1 Sid. 31, where see the legal value of the word "Evidences;" also cited in *R. v. Wheeler*, Cas. t. Hard., by Lee, 99. S. C. Cunn. 155. Bac. Abr. tit. "Man." (D.) See tits. "Attorney" (Rolls), "Books," "Corporation Municipal" (Insignia, &c.), "County," "Manor" (Rolls), "Papers Official," "Records."

(s) See tit. "Compensation" (Office).

(t) 4 A. & E. 286.† S. C. 5 N. & M. 589, 600,† per Ld. Denman, C. J.; and see 6 N. & M. 508.† See also 6 N. & M. 520,† where the Court said that all that was settled in 5 N. & M. 589.† was that their Lordships ought to make a return, and that beyond that no such rule of law was laid down. See *R. v. Hornby*, or *The Bankers' case*, 11 Harg. St. Tr. 136. S. C. 14 How. St. Tr. 1. S. C. 5 Mod. 29. See tits. "Crown," "Customs," "Manor" (Royal Manor), "Pension," "Half-pay."

which it appeared *prima facie*, that a government pension had been granted, that funds applicable to its payment had been placed by Parliament in the hands of the lords of the treasury, as public officers *charged by statute* with the payment of such persons; that such lords had allotted the fund for the payment, had acknowledged to the claimant that they held it for his use, and that they only refused to pay because he declined to take it clogged with conditions, which they had no right to impose; upon these facts to which no answer was given, the Court granted the mandamus against their lordships, but in so deciding it did not implicitly infringe, but on the contrary, expressly affirmed the doctrine, that a mandamus will not lie against the Crown or its servants as such; *(u)* and therefore, that notwithstanding a legal right be shewn to something over which the lords of the treasury as such, have control, yet a mandamus cannot properly issue to them in respect thereof. *(x)* Thus, a mandamus will not lie to them as the mere public depositories of money to command the payment by them of a sum of money in gross. *(y)*

*—.] *Appeal*.—If the lords of the treasury refuse to hear [*266] an appeal over which they as such have jurisdiction by act of Parliament, the Court may and will issue a mandamus to command them so to do, but if they do decide upon it, even though they set out wrong reasons for their judgment, the Court cannot review it. *(z)* So if their lordships having jurisdiction mistake in point of law, such is not a sufficient ground to warrant a mandamus. *(a)* But if their lordships assume jurisdiction where they have none, the Court will review their decision in order to avoid a defect of justice, but will not grant a mandamus to them. *(b)*

— *Rule*.—The service of a rule upon the lords of the treasury is usually effected upon their solicitor. *(c)*

TRINITY HOUSE HALL.] *Restoration*.—The writ lies to command the corporation of the Trinity House Hall, to restore to the brotherhood of that society *(d)* one improperly removed therefrom.

(u) *In re Baron de Bode*, 6 D. 792. S. C. 1 W., W. & H. 332, confirmed by *In re Hland*, 4 A. & E. 984.† S. C. 6 N. & M. 508.† *In re Smith*, 4 A. & E. 976.† S. C. 6 N. & M. 505.† *Ex parte Ricketts*, 4 A. & E. 999.† S. C. 6 N. & M. 523.† See tits. "Crown," "Customs."

(x) *Gidley v. Ld. Palmerston*, 3 Brod. & B. 275.† S. C. 7 B. Moore, 91, cited in *R. v. Treasury (Comms.)*, 6 N. & M. 513.†

(y) *In re Baron de Bode*, 6 D. 776. S. C. 1 W., & H. 332. See tits. "Crown," "Customs," "Manor" (Royal Manor).

(z) *R. v. Treasury (Lords)*, 2 P. & D. 502. See tits. "Act of Parliament," "Compensation" (Office), "Courts Inferior" (Review of Judgment), "Quarter Sessions" (Review, Judgment), and ante, p. 230, n. *(b)*.

(a) *Ex parte Pratt*, 2 N. & P. 102, cited in *R. v. Treasury Lords*, 2 P. & D. 503. See tit. "Quarter Sessions" (Hearing).

(b) *R. v. Poole (Mayor)*, 3 N. & P. 119. S. C. 7 A. & E. 730,† cited in *R. v. Treasury (Lords)*, 2 P. & D. 503.

(c) *R. v. Treasury (Lords)*, 4 A. & E. 976.† S. C. 6 N. & M. 505.† See post, tit. "Rule" (Service).

(d) Ante, p. 12. *Bagwell v. Jobson*, 1 Barn. 144. See tits. "Company," "Cutlers' Company," "Franchise," "Freedom" (Company), "Office" (Restoration).

TRUST.] The Court will not interfere in the case of a *trust* or other mere *equitable right*, for the writ of mandamus is only a legal remedy for a legal right where there is no other specific legal remedy.(*e*)

TRUSTEES.] The writ lies to command the holding of a meeting of the trustees appointed by a parish act, for the purpose of swearing in and admitting one elected trustee.(*e*) So, it lies to command parish trustees to admit their accounts in pursuance of a local act.(*f*)

TURKEY COMPANY.] See titles *Company*; *Freedom (Company.)*

TURNPIKE TRUSTEES.] See tit. *Highway (Toll-gates; Tolls.)*

UMPIRE.] See titles *Arbitrator*; *Award*; *Savings' Bank.*

UNDERMASTER OF SCHOOL.] See titles *College (Master)*; *School (Undermaster; University.*

***UNIVERSITY.]** This subject is arranged as follows:— [**267*]

UNIVERSITY.					UNIVERSITY.				
Duty, &c.	-	-	-	267	Regius Professor	-	-	-	268
Member	-	-	-	267	Appointment	-	-	-	268
Admission	-	-	-	267	High Steward	-	-	-	268
Academical Degrees	-	-	-	267	Appointment	-	-	-	268
Admission	-	-	-	267	Scholar	-	-	-	268
Restoration	-	-	-	267	Removal	-	-	-	268
Returns	-	-	-	268	Restoration	-	-	-	269

—.] *Duty, &c.*—The writ lies to command an University to give effect to the regular corporate act of the whole body, for in such case the visitor has no jurisdiction, and the Court of B. R. has always interfered.(*g*)

—.] *Member; Admission.*—No instance has occurred of a mandamus having been granted to the Universities to command the admission of a person as a member, in order that he might proceed to take his degrees, as a doctor's degree, and thereby be enabled to exercise the profession of an advocate in the Ecclesiastical Courts.(*h*)

(*e*) Ante, p. 9, 22, 64, n. (*y*). R. v. Canterbury (Archbishop), 15 East, 149, 150, per Ellenborough, C. J. R. v. Stafford (Marq.), 3 T. R. 646, per Kenyon, C. J. See tits. "Charity," "Dissenters," "Institutions" (Private), "Legacy," "Trustees."

(*e*) R. v. Kensington, 2 B. & Ad. 740,† See tits. "Act of Parliament," "Churchwarden" (Election).

(*f*) R. v. St. Pancras, 3 A. & E. 535,† S. C. 5 N. & M. 222,† R. v. St. Pancras, 6 A. & E. 314,† S. C. 1 N. & P. 507,† 6 A. & E. 321,† a. See tits. "Accounts," "Act of Parliament," "Auditor," "Parish."

(*g*) R. v. Cambridge (U.), Burr. 1647. R. v. Dr. Bland, cited in Burr. 1663. S. C. 2 Burn's Eccl. Law, 117, 8th edit. R. v. Bedford (Mayor), T. T., 14 and 15 Geo. 2. See R. v. Kendall, 1 Q. B. 378,† n. (*e*). See tits. "College" (Seal), "Seal," "Visitor."

(*h*) Ante, p. 12—15. R. v. Lincoln's Inn, 7 D. & R. 364,† per Abbott, C. J. R. v. Canterbury (Archbp.), 8 East, 213, cited in 7 D. & R. 365,† See tits. "Advo-

—.] *Academical degrees; Admission.*—The writ lies to command the admission of one duly qualified to academical degrees, for they are blended with a temporal right.(i) Thus the writ has been granted to admit one duly entitled to the academical degrees of master of arts, &c.(j) But in all the cases upon this subject, it does not appear that "visitor" was returned.(k)

—.] *Restoration.*—The writ has also for the same reason, been granted to restore to academical degrees, one wrongfully deprived or suspended, as "Bachelor of Arts," "Master of Arts," "Doctors of Divinity," &c.(l) But it *has been held, that the writ does not lie to command the Vice Chancellor of the University to restore to the franchises of a resident Master of Arts of such University.(m)

—.] *Returns.*—It seems that if there be a return that there is a visitor, a peremptory mandamus will not be granted, either to admit or to restore to academical degrees,(n) the Court will however require a *return*, that there is such visitor, and not supersede the mandamus upon affidavits(o) of the fact.

A return that the prosecutor has been degraded for having spoken contemptuous words of the Vice Chancellor, and the process of his Court is ill, and a peremptory mandamus will be awarded; but contra if the words are contemptuously spoken of the University.(p) So if a return allege a suspension or degradation, and do not state that the party so suspended, &c., was summoned to attend the proceedings or made any defence thereto, it will be defective in substance.(q)

cate of Doctors' Commons," "College" (Member, Admission), "Inn of Court" (Admission), "Physicians' College."

(i) Ante, p. 12; 3 Bl. Com. 110. Dr. Bentley's case, T. 9 Geo. 1; 8 Mod. 148, 151, cited in R. v. London (Ep.), 1 Wils. 13. Baketon's case, cited in Patrick's case, Raym. 109. S. C. 2 Keb. 65. This writ was directed to the Chancellors and Masters of the University of &c., and tested thus: "Teste Rege, 28 die Martii, al York," 5 E. 2, M. 8; Riley, 533, 534. But see tits. "Dignity," "Inn of Court," "Physicians' College."

(j) Riley's Plac. Par. 533, cited in R. v. Patrick, 2 Keb. 66. S. C. Raym. 101.

(k) See infra, as to restoration to degrees, and the visitor's power. See tits. "College," "Dignity," "Inn of Court," "Physicians' College," "Visitor."

(l) Ante, p. 12. R. v. Cambridge (U.), 9 Geo. 1; 8 Mod. 148, 151. S. C. Stra. 557. S. C. Fortesc. 202. S. C. Andr. 176. S. C. Ld. Raym. 1334; Com. Dig. tit. "Man" (A). See also R. v. St. Catherine's Hall, 4 T. R. 236. R. v. Lincoln's Inn, 4 B. & C. 857; Ld. Raym. 1564; Esp. Dig. 677. Philips v. Bury, 2 T. R. 346. Dr. Bentley's case, 8 Mod. 148, cited in D. Walker's case, Cas. t. Hard. 215, 216, 218. It did not appear that there was a visitor; Bac. Abr. tit. "Man." C. But see post, tit. "Visitor."

(m) R. v. Cambridge (U.), 6 T. R. 89.

(n) Ante, p. 10. Vide Show. 74; 3 Mod. 265; 1 Sid. 71. S. C. 1 Mod. 82. S. C. 2 Lev. 15. S. C. 1 Lev. 23; Carth. 168; Raym. 31, 102; 2 Jones, 175; and see 8 Mod. 160, supra. See tits. "College," "Visitor."

(o) R. v. Whalley, Stra. 1139, and see tit. "Visitor," and post, tit. "Superse-deas."

(p) Ante, p. 40, n. (n); 8 Mod. 148, supra, and cases there cited. See tit. "Office" (Restoration Returns).

(q) Stra. 557, supra. See tit. "Office" (Restoration Return), and post, tit. "Return."

—.] *Regius Professor; Appointment.*—The writ lies to command an University to proceed to the choice of a regius professor.(*r*)

—.] *High Steward Appointment.*—The writ lies to command the Vice Chancellor of an University to hold a congregation to receive the declaration of the proctors, in respect to a majority, to the proctors to declare how such majority stood, and to the keepers of the common seal of the University, to set it to the appointment of high steward, because there is a salary annexed to the office, and no other specific legal remedy.(*s*)

—.] *Scholar; Removal.*—The writ has been granted to remove a scholar from the University(*t*) as for being a Lollard.(*u*) Thus, one Robert Lichdale, a scholar at Oxford, who maintained Lollardy having been complained of, and the University having been remiss in punishing him, (the bishop not having jurisdiction though in a cause of heresy), the king directed his writ of mandamus to the Chancellor of the University, and thereby commanded him to remove Lichdale; the phraseology of the writ was very *remarkable, inasmuch as it alleged that this Lichdale [*269] did “publicare, communicare and docere opiniones nefarias, ac conclusiones detestabiles in Fidei Catholicæ lesionem, et Universitatis prædictæ subversionem, nisi brachio regie majestatis citius resistatur,” and then commanded that they should examine “per inquisitionem vel alio modo legitimo si ipsum talem inveniri contigerit.”(*v*)

—.] *Restoration.*—So the writ has been granted to command the restoration of a scholar of the University of Cambridge. Thus, such University temp. 5 Edw. 2, excluded certain scholars who were of the order of the Predicants, and denied them any privilege of the University, and thereupon these scholars applied themselves to the king, and obtained a mandamus directed to the Chancellor, regentibus et non regentibus of the University, commanding them to allow the complainants the privileges by them challenged.(*w*)

(*r*) Ante, p. 12; 1 Barn. B. R. 82, M., 7 Geo. 1, cited in Dr. Walker's case, Cas. t. Hard. 215, 218. It did not, however, appear that there was a visitor. See tits. “College” (Master), “School” (Master).

(*s*) Ante, p. 18—27. R. v. Cambridge (U.), 1 W. Blac. 546. S. C. Burr. 1647, 1648; Bac. Abr. tit. “Man.” (D.) See tits. “Office” (Fees, &c.), “Overseers” (Election), “Steward” (High). (The rule in such cases usually requires notice thereof to be given to the University, and to any person, the validity of whose vote may be disputed). See R. v. Surrey (J.), 2 Show. 74, n. (*d*), 3rd edit.; Vide Vin. Abr. tit. “Officer” (O.); Com. Dig. tit. “Man.” (A.) See tits. “College” (Seal), “Charity,” “Seal.”

(*t*) Riley's Plac. Parl. 601, cited in R. v. Patrick, 2 Keb. 66. See tits. “College” (Fellows, Expulsion), “Visitor.”

(*u*) Ril. Plac. Parl. 60. R. v. St. John's Coll., Skin. 547.

(*v*) Patrick's case, Raym. 110; 50 Ed. 3, pars. 2, memb. 8. John Wolverton's case. So in the 19 Rich. 2, a writ was directed to the Chancellor of Oxford to expel Lollards. See Ryley's Plac. Parliam. 601, cited in R. v. St. John's Coll., 4 Mod. 240.

(*w*) Co. 2nd Inst. 640; Riley, 601; Claus. 19, R. 2, M. 24. Patrick's case, Raym. 110. This, however, was a Parliamentary writ, the jurisdiction of which was undefined, and it does not appear that “Visitor” was returned. See ante, p. 3, n. (*l*), 251, n. (*z*).

So writs of mandamus have gone (out of Chancery) to restore a Bannitus of the University.(x) But it was said by Windham, C. J. in a similar case, (y) that he had seen a writ to restore a man banished the University, but that it issued in irregular times, and that it was not to be followed, and that it (together with others of the same class) was auctoritate Parlamenti, by petition presented to the king and Parliament, from which the House of Lords was then a distinct Court of judicature, and that to such petitions the king gave present answers unicâ voce without an act of Parliament.(z)

So a writ to restore, &c., has been granted to a scholar, who had been suspended by the Vice Chancellor, upon which restitution was granted.(a) But at this day it is apprehended, that a mandamus would not be granted to restore one, against whom either mere banishment from the university has been pronounced, or has been suspended.(b)

The writ lies, however, to restore one to a place in a University, if there be no visitor(c) having jurisdiction.

USHER OF SCHOOL.] See titles *College (Master)*; *School (Usher)*.

VERGER OF ST. PAUL'S.] *Restoration*.—The writ has been granted to command restoration to the office of verger of St. Paul's.(d)

[*270] *VESTRY.] This subject is arranged as follows:—

VESTRY.			VESTRY.		
To hold Vestry	-	- 270	Select Vestrymen	-	- 271
Books, &c.	-	- 270	Appointment	-	- 271
Delivery	-	- 270	VESTRY CLERK	-	- 271
SELECT VESTRY.			Admission	-	- 271
Formation.	-	- 270			

—.] *To hold Vestry*.—Where the inhabitants at large of a parish, or a considerable portion of them, wish to have a vestry called, for a proper and legitimate purpose, and a refusal is made so to do, both on the part of the minister and churchwardens, it seems the Court of B. R. will, by mandamus, not to the inhabitants, but to the churchwardens, command them to summon the inhabitants to the vestry, in order that the acts which the inhabitants wish, shall be done.(e) Thus the writ lies to command church-

(x) Ante, p. 2. R. v. Appleford, 3 Keb. 863, 864. See tit. "College."

(y) 2 Keb. 167, and ante, p. 251, n. (z).

(z) 2 Keb. 167. See R. v. St. Catherine's Hall, 4 T. R. 235, citing Dr. Witherington's case, 1 Keb. 234, &c. See tit. "Visitor."

(a) 50 Ed. 3, memb. 6: Clo. Roll., and 2 Richd. 2; and see 2 Keb. 863, 864, supra. See tit. "Office" (Suspension).

(b) R. v. Cambridge (U.), 6 T. R. 89. See tits. "College" (Visitor), "Visitor."

(c) Ante, p. 10. See R. v. St. Catherine's Hall, 4 T. R. 235, citing Dr. Witherington's case, 1 Keb. 234, &c. See tit. "Visitor."

(d) Ante, p. 12, T., 22 Geo. 3. Guide's Cr. Pr. 204. See tit. "Office" (Public), (Spiritual Officer).

(e) R. v. Stoke Damerel (Minister), 1 N. & P. 58,† per Ld. Denman, C. J. S. C.

wardens to assemble parishioners in the manner required by stat. 1 & 2 Wm. 4, c. 60, in order to elect within a reasonable time, a vestry and auditors of parish accounts, &c. ;(*f*) or for any other lawful purpose.(*g*) So the writ lies to command churchwardens to assemble parishioners, for the purpose of taking a poll upon a motion put to the vote by a shew of hands, at a general meeting of the inhabitants. But where a vestry, having by a shew of hands passed a resolution, directing a misapplication of some charitable funds, and a poll having been demanded of the person presiding at the vestry, and not granted; the Court refused a rule for a mandamus to command such person to grant a poll, because the object of the vote was, in fact, a breach of trust, and therefore illegal.(*h*)

—.] *Books; Delivery.*—The writ has been held not to lie to command the delivery up to the vestry clerk of the vestry books; as he may bring detain or trover for them, unless they be claimed by the defendant on the ground of his supposed election to the same office.(*i*)

—.] *SELECT VESTRY; Formation.*—The writ lies to command churchwardens and overseers of the poor to give notice of a vestry meeting for the purpose of considering the propriety of establishing a select vestry for the concerns of the poor, pursuant to stat. 59 Geo. 3, c. 12, and of nominating and *electing the members thereof, if it should appear to the vestry so summoned, that such select vestry ought to be established; but a return that there was, by custom, an ancient vestry in the parish, which had from time immemorial consulted and deliberated on parochial matters, and acted as a select vestry for the concerns of the poor, and that they had immemorially been accustomed to perform the duties imposed on select vestries by the statute, has been held to be bad, because the statute imposes some duties as the management of money raised by poor rates, and the making orders for the government of overseers, which could not have existed before the stat. 43 Eliz. c. 2.(*j*)

—.] *Vestrymen, Select; Appointment.*—The writ lies to command justices to appoint, by writing, &c., certain persons elected by the inhabitants under their parish act, as select vestrymen.(*k*)

5 A. & E. 584.† See tits. “Churchwarden” (Election), “Corporation Ministerial” (Duties, &c.), “Overseers” (election), “Parish” (Parish Meeting).

(*f*) R. v. St. Pancras, 1 A. & E. 80.† R. v. St. Pancras, 11 A. & E. 15, 27,† n. (*g*), where see form of rule. See tits. “Churchwardens” (Election), “Parish.”

(*g*) Ante, p. 9. R. v. Birmingham (Rector), 7 A. & E. 258.† R. v. D. Ogly, 12 A. & E. 139.† R. v. Stoke Damerel (Minister), 5 A. & E. 589.† S. C. 1 N. & P. 56.† R. v. Clerkenwell Parish, 1 A. & E. 317.† See tits. “Guardians of Poor,” “Sexton.”

(*h*) Ante, p. 16. R. v. St. Saviour’s (Churchwardens), 4 A. & E. 380.† See tits. “Charity.” “Rate.”

(*i*) Anon., 2 Chit., 255.† See tits. “Accounts,” “Blacksmiths’ Company,” “Books,” “Corporation Municipal” (Books, &c.), “Manor” (Rolls, &c.), “Paupers, Official,” “Parish” (Books, &c.), “Records.”

(*j*) Ante, p. 222, n. (*w*). R. v. St. Bartholomew (Churchwardens), 2 B. & Ad. 506.† R. v. Woodman, 4 B. & A. 507.† R. v. St. Martin’s Parish, 3 B. & Ad. 907.† See tits. “Overseers,” “Parish.”

(*k*) Ante, p. 12. R. v. Adams, 2 A. & E. 409.† R. v. St. Mary, Kensington, 2 B. & Ad. 740,† and cases there cited. R. v. Kent, (J.), 4 N. & M. 299.† See tits. “Act of Parliament,” “Overseers,” “Quarter Sessions.”

—.] VESTRY CLERK; *Admission*.—A mandamus will not lie to admit to the office of vestry clerk. There has never been but one supposed instance of such a mandamus, and of that there exists no satisfactory account.^(l) The office is neither fixed nor permanent, but depends altogether on the will of the inhabitants, who may elect a different clerk at each vestry. It has not any salary annexed, and the mere fact that the fees are to be paid out of the poor rates, shews there can be no prescriptive right to it; in a word it is an employment merely of a private nature, and he who fulfils it, is the servant of a mere fugitive body.^(m)

VICAR.] *Presentation*.—The writ lies to command the master of a private corporation to affix the corporate seal to a deed of presentation to a vicarage;⁽ⁿ⁾ in such a case the writ may be directed to the master alone.^(o)

VICE MASTER.] See titles *College (Vice Master)*; *School*; *University*.

VICE CHANCELLOR.] See titles *College (Fellows, Expulsion)*; *University*.

VILL, CLERK OF.] *Restoration*.—The writ has been granted to command restoration to the place of clerk of a vill.^(p)

[*272] *VISITATION.] The writ does not lie to command the providing of necessities upon a visitation, because there is another specific legal remedy, namely, by suing for procurations.^(q)

VISITOR.] It appears by a review of the older cases of authority, which have reference to applications to the Court of B. R., for writs of mandamus to those institutions, properly subjected to visitatorial jurisdiction, that the questions therein commonly raised and discussed, have been, whether there be a visitor? and if so, whether he be capable of

(l) Per *Ld. Kenyon*, C. J. *R. v. Croydon (Churchwardens)*, 5 T. R. 714; *Bac. Abr. tit. "Man."* C.

(m) See *R. v. Croydon (Churchwardens)*, 5 T. R. 714. *R. v. St. Nicholas (Guardians)*, 4 M. & S. 324. See *tit. "Guardians" (Treasurer)*, "Office" (Freehold).

(n) *R. v. Kendall*, 4 P. & D. 602, where see form of writ. S. C. 1 Q. B. 366, † S. C. 10 L. J. N. S. 137, Q. B., also cited in *R. v. Ottery, St. Mary*, 3 G. & D. 383. S. C. 1 Q. B. 157, 160, † per *Ld. Denman*, C. J. See *tit. "College" (Seal)*, "Hospital" (Seal), "Parson," "Seal."

(o) 4 P. & D. 603. S. C. 1 Q. B. 366, † *supra*. See *post*, "Writ" (Direction).

(p) 19 Jac., cited in *The Protector v. Craford*, Sty. 457. See *tit. "Office."*

(q) *An'c*, p. 18—27, cited in *R. v. Dublin (Dean)*, Stra. 542. See *tit. "Bishop," "Chrism," "Sacrament."*

visiting? (*r*) as these questions were decided, so the writ was either granted or refused. Such questions are also, for the same reasons, at this day of the last importance, and must be satisfactorily resolved before an application can be successfully made to the Court of B. R. for its interference as to the ordinary concerns of such institutions; because with any matter properly subject to visitatorial jurisdiction, the Court of B. R. cannot intermeddle. (*s*)

As to the question, who is visitor? modern decisions show that in the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder; the right of visitation in default of his heirs, devolves upon the king, to be exercised by the great seal; (*t*) so that there necessarily must be one upon such a foundation, who has the general right to visit in general cases. (*u*) Also other corporations, which have visitors, in general have them either by the appointment of the founder, or of the law; if a lay one, the founder or his heirs; (*v*) if an ecclesiastical one, (*w*) and no visitor have been appointed, the bishop of the diocese is, *ex officio*, visitor, and therefore it is that a mandamus has never been moved for an abbot nor for a prior. (*x*)

On the other hand, all institutions, either not the subjects of visitatorial authority; (*y*) or where such authority is in the nature of a claim of cognizance, which does not exclude the ordinary constitutional method of obtaining justice, the Court of B. R. has jurisdiction to interfere, by writ of mandamus, provided a specific legal remedy for the subject-matter, do not exist. (*z*). So the Court of B. R. has also jurisdiction, where the visitatorial *power is either wholly extinct or suspended; thus a rule [*273] for a writ of mandamus has been granted to command a bishop, who was also warden of Manchester College, to admit a chaplain, upon the ground that as the visitatorial power was suspended, so the remedy was in the court of B. R., in order to prevent a failure of justice. (*a*)

If, however, as before stated, there be a visitor to whom the party grieved may appeal, such a fact will constitute a good return; for the

(*r*) 5 Mod. 404. Patrick's case, 13 & 14 C. 2. S. C. Raym. 101. S. C. 1 Lev. 65. S. C. 1 Sid. 346. S. C. 1 Keb. 289. S. C. 2 Keb. 65, 164, 259. R. v. Allsop, 2 Show. 170.

(*s*) See ante, p. 10, n. (*h*), and post, p. 274, n. (*f*). See tit. "College (Visitor)."

(*t*) R. v. St. Catherine's Hall, 4 T. R. 233. R. v. Allsop, 2 Show. 170.

(*u*) R. v. Chester (Ep.), 1 Barn. 52.

(*v*) 3 Mod. 334. Parkinson's case, 1 Show. 74, and n. (*c*); 4 T. R. 233; see 1 W. Blac. 89, n. (*h*). See tit. "College" (Visitor), and the several subjects of this series.

(*w*) Parkinson's case, 1 Show. 74; 1 W. Blac. 89, n. (*h*). See tit. "Abbott," &c.

(*x*) R. v. Lee, 1 Show. 252, per Holt, C. J.; 2 Roll. Abr. 229. R. v. Gray's Inn, Doug. 353; 1 Mod. 12; Burr. 567. As to who are visitors, see 5 Mod. 404; Burr. 1647; 1 W. Blac. 89, n. (*h*). See tits. "Abbot," "Prior, &c."

(*y*) R. v. Alsop, 2 Show. 170, and 2 Show. 170, n. (*d*), 3rd edit. R. v. Kendall, 1 Q. B. 366.† S. C. 4 P. & D. 602. Dr. Withrington's case, 1 Keb. 150.

(*z*) 4 T. R. 241 (*a*). R. v. Whaley, Stra. 1139. See ante, p. 18—27.

(*a*) R. v. St. Catherine's Hall, 4 T. R. 236, 238, 239, citing R. v. Chester (Ep.), Stra. 797. MS. Ld. Hard. 2 Geo. 2, c. 29.

Court of B. R. cannot interfere, by mandamus, concerning anything within the visitatorial authority, it being a species of forum domesticum, having a separate and exclusive jurisdiction. Thus a mandamus will not lie to restore to a college fellowship, if such college has a visitor, (*b*) for he is the sole and proper judge of the private laws of his college, and it is his duty to determine offences against them. It is only in cases where the law of the land is disobeyed, that the Court of B. R. can assume jurisdiction, notwithstanding the visitor; in some of which cases, namely, those that are of a public nature, it may be that the proper course of proceeding is by writ of mandamus; (*c*) but with visitatorial questions, they being purely of private and domestic relations, the public is not concerned, and with them the Court of B. R. has always inclined not to intermeddle. (*d*) Indeed so desirous is such Court not to invade the jurisdiction of the visitor, that it will refuse to try, upon affidavits, whether or not there [*274] be a visitor? but insist upon a return in order that the other party may have an opportunity to right himself. (*e*) The rule is, that if it do not appear, whether there be a visitor or not? or, whether or not he have authority? the Court will grant a rule to shew cause; but that if it should clearly appear that there is a visitor having jurisdiction, the Court will not intrude upon his jurisdiction. (*f*)

(*b*) Ante, p. 10. Bull. N. P. 195. See tits. "Blue Coat School," "Canons," "College" (Fellow, Restoration). Parkinson's case, 1 Show. 74. S. C. Carth. 92; Carth. 168. S. C. 2 Show. 170. S. C. Comb. 143. Usher's case, 5 Mod. 452. R. v. Chester, (Ep.), Stra. 797. Phillips v. Bury, Skin. 454. per Eyre, J., and 474, per Gregory, J. See R. v. Ely, (Ep.), 1 Wils. 266. S. C. 1 W. Blac. 52, 58. R. v. Chester, (Ep.), 1 Barn. 52. R. v. St. Catherine's Hall, 4 T. R. 233. R. v. Alsop, 2 Show. 170. R. v. Raines, 3 Salk. 233, 11, 14. Dr. Walker's case, Cas. t. Hard. 217. Indeed, in more recent cases it has been said, that no case can be cited where a mandamus has been granted to a visitor. R. v. Chester, (Ep.), 1 W. Blac. 23. S. C. 1 Wils. 206. See 1 W. Blac. 90, n. (*h*). Parkinson's case, 3 Mod. 265. S. C. Carth. 93. See Brideoak's case, 1 W. Blac. 25. Com. Dig. tit. "Man." (B.) See Anon., T. T., 13 Car. 2, 1 Keb. 101. per Twysden, J.

The college may interpose to stop a mandamus to a visitor. R. v. Ely (Ep.), 1 W. Blac. 52. S. C. 1 Wils. 266. See tits. "Abbot," "College" (Visitor), "Prior." As to when the Court will or will not interfere as to acts done by a visitor; Phillips v. Bury, 2 T. R. 346. S. C. 4 Mod. 106. S. C. 1 Show. 360. S. C. Skin. 454. And see R. v. St. John's Coll., 4 Mod. 238; Stra. 913. Eden v. Forster, 2 P. Wms. 325.

As to the extent of the visitor's jurisdiction: Jennings's case, 5 Mod. 422, 423, n. (*a*). R. v. Blythe, 5 Mod. 404. Usher's case, Id. 452, 453. Parkinson's case, Carth. 93. S. C. 3 Mod. 265. Trinity Chapel (Dean), v. Dublin (Archbp.), 8 Mod. 183. R. v. Ely (Ep.), 1 W. Blac. 76. S. C. Burr. 158. S. C. 1 Ld. Ken. 411. R. v. Ely (Ep.), 1 Wils. 266. S. C. 4 W. Blac. 52, 58. Att. Gen. v. Clare Hall, 3 Atk. 662. R. v. St. John's Coll., 5 Mod. 369, n. (*b*). S. C. Comb. 238.

(*c*) R. v. Lincoln's Inn, 4 B. & C. 857, $\frac{7}{8}$ R. v. St. John's Coll., 4 Mod. 241, per Holt, C. J. R. v. Dr. Bland, 7 Mod. 356. R. v. Lincoln (Ep.), 2 T. R. 338, n.

(*d*) Ante, p. 10. R. v. Ely (Ep.), 1 W. Blac. 52, 58, S. C. 1 Wils. 266. R. v. Chester (Ep.), 1 W. Blac. 21. S. C. 1 Wils. 209. Parkinson's case, 2 Show. 170. S. C. Comb. 143. Apleford's case, 1 Mod. 82, 84. S. C. 2 Keb. 799, 861. See tits. "Charity" (Private), "Institutions," "Office" (Public).

(*e*) R. v. Whaley, Stra. 1139. R. v. St. John's Coll., Comb. 238. Dr. Withrington's case, 1 Sid. 71; 1 Mod. 82. Apleford's case. See post, tit. "Writ."

(*f*) R. v. Ely (Ep.), 1 Wils. 209, 266. S. C. 1 W. Blac. 51. Usher's case, 5 Mod. 452. R. v. Ely (Ep.), 2 T. R. 337. Com. Dig. tit. "Man." (B.) And see Broadoak's case, 11. 42 Ann.; also Trem. Pl. Cor. 490, 492, 493, for forms of returns of visitors.

If a visitor, having jurisdiction, exceed it, or assume one which he has not, the Court of B. R., will not grant a mandamus, although advantage may not have been taken in time of prohibition; (*g*) for it would be nugatory to grant a mandamus first, and a prohibition afterwards. (*h*)

The writ does not lie to command a visitor to exceed his jurisdiction: thus, it has been refused, to command him to exercise his visitatorial power over the temporalities of a prebend, during a vacancy, because, in such case, an action at law is the proper remedy. (*i*)

A visitor cannot, however, properly refuse to exercise his visitatorial power or jurisdiction; and, therefore if he should neglect or refuse so to do, the Court of B. R. will, by mandamus, command him to exercise such power. (*j*) Thus if the visitor of a college refuse to visit it, the Court of B. R. will compel him so to do, by mandamus. (*k*) So it will command him to convene parties before him, and hear them, (*l*) or to hear and determine a complaint. (*m*) So to command him, if the appeal be to him, to hear such appeal, and give some judgment. (*n*)

It is, however, a rule, that if the visitatorial power be exercised, the Court of B. R. will not interfere, how erroneously soever it may have been exercised; (*o*) for there is no precedent of a writ having gone to command a visitor to reverse his own sentence; (*p*) but such rule [*275] does not extend to those cases where the decision of the visitor is not within his visitatorial function. (*q*) Nor will the Court of B. R. inquire, by mandamus into the validity or invalidity of the decision of a visitor; for it is sufficient, if such visitor merely state in his return, that he has decided. (*r*) Thus, where a mandamus was prayed to command a

(*g*) *R. v. Chester (Ep.)*, 1 W. Blac. 22. S. C. 1 Wils. 206. And see 1 W. Blac. 52. S. C. 1 Wils. 266.

(*h*) *Ante*, p. 15, 16; 1 W. Blac. 58.

(*i*) *Ante*, p. 18—27. *R. v. Dunhuensem (Ep.)*, Burr. 567, and cases there cited. See tit. "Prebendary."

(*j*) *Ante*, p. 10, 12—15; 2 T. R. 338, n. and 5 T. R. 475, *infra*, n. (*o*); and see *Dr. Walker's case*, Cas. t. Hard. 219, n. (1). *R. v. Lincoln (Ep.)*, Tr. 25 Geo. 3, B. R., cited in 2 T. R. 322. *Bac. Abr. tit. "Man." C. 2.*

(*k*) *R. v. Chester (Ep.)*, 1 Wils. 209. S. C. 1 W. Blac. 22. *R. v. Worcester (Ep.)*, 4 M. & S. 415. *R. v. Ely (Ep.)*, 5 T. R. 475. *Bac. Abr. tit. "Man." C. 2.*

(*l*) *R. v. Canterbury (Archbp.)*, 15 East, 129. *R. v. Ely (Ep.)*, 2 T. R. 336.

(*m*) 2 T. R. 338; 5 T. R. 475; 2 T. R. 338, n. (*a*), *supra*. See tit. "Quarter Sessions" (Justices).

(*n*) *R. v. Lincoln (Ep.)*, 2 T. R. 338, n. *R. v. Allsop*, 2 Show. 170, 171. *R. v. Surrey, (J.)*, 2 Show. 74, n. (*d*), 3rd. edit. *Philips v. Bury*, 2 T. R. 346. S. C. 4 Mod. 106. *R. v. Ely (Ep.)*, 5 T. R. 475, *acc. R. v. Chester (Ep.)*, Stra. 797, recognised and approved by Lord Hardwicke in 1 Ves. 471, and by Buller J., in 2 T. R. 339; 2 Geo. 2, c. 29. *Parkinson's case*, 1 Show. 74, n. (*a*). *R. v. Worcester (Ep.)*, 4 M. & S. 415. *Leigh's case*, 3 Mod. 334. *Usher's case*, 5 Mod. 453. *Com. Dig. tit. "Man." (A.) (B.)* See tits. "Courts Inferior" (Appeal), "Quarter Sessions" (Appeal).

(*o*) *Supra*, n. (*j*), (*m*); 2 T. R. 336; 2 T. R. 337, per Buller J., in 2 T. R. 339; 5 T. R. 475; *Cas. t. Hard. 219*, n. (1); 2 T. R. 346. S. C. 4 Mod. 106, *supra*. *R. v. St. Catherine's Hall*, 4 T. R. 235.

(*p*) *R. v. Chester (Ep.)*, 1 W. Blac. 25. S. C. 1 Wils. 206; 2 T. R. 337, per Buller J., *supra*. See tit. "Quarter Sessions."

(*q*) 2 T. R. 290; *Cas. t. Hard. 219*, n. (1). See *ante*, p. 274, n. (*g*), (*h*), (*i*).

(*r*) *R. v. London (Mayor)*, 9 B. & C. 21, † S. C. 5 M. & R. 36. *Philips v. Bury*, 2 T. R. 351. S. C. 4 Mod. 106. S. C. 1 Show. 360. S. C. Skin. 454. And see 2 T. R. 290, 345. See tit. "Quarter Sessions."

visitor to receive, hear, and determine an appeal, the Court held, that where by the statutes of a college, a visitor is appointed who is to interpret the statutes, and an appeal is lodged with him, a mandamus will lie to command him to hear the parties and form some judgment though he cannot be compelled to go into the merits; for it is sufficient, if he decide the appeal came too late;(s) therefore, when the visitor has determined the matter, no mandamus will lie;(t) for as he has for the most part an entire, and almost an arbitrary, power, so there can be no appeal from him, or other remedy against his judgment.(u)

It is also a rule of law upon this subject, that a mandamus does not lie to command the doing of that which a visitor has enjoined;(v) for a mandamus to help a general visitor to visit his college, or to command an inferior officer to do his duty, is *felo de se*, and shall be quashed.(w)

VOTE.] See titles *Burgess Roll*; *Corporation Municipal (Duties, &c.)*; *Councilman (Duties, &c.)*; *Overseers (Election)*; *Parish (Election)*.

WAGES.] *Millers*; *Weavers*.—The writ has been granted to command the county justices, together with the sheriff of the same county, pursuant to stats. 16 Car. 1, c. 4, s. 2, and 1 Jac. 1, c. 6, to hear and determine upon the application of certain millers or weavers of the said county, and to limit, rate, and appoint the wages of millers and weavers in the said county;(x) but as a discretion is, by such acts, vested in the justices, [*276] the Court will not *command them to limit the rate of wages, but merely to entertain the application.(y)

WARDEN OF COLLEGE.] See titles *College (Scol)*; *Visitor*.

WARRANT.] See titles *Distress*; *Quarter Sessions (Justice, Warrant)*.

(s) Ante, p. 10, supra, n. (r). *Usher's case*, 5 Mod. 454, n. (b). *R. v. Ely (Ep.)*, 5 T. R. 475, acc. *R. v. Lincoln (Ep.)*, T. 25 Geo. 3, 2 T. R. 338. *Philips v. Bury*, 2 T. R. 351. And see *R. v. London (Mayor)*, 9 B. & C. 25.† *R. v. Worcester (Ep.)*, 4 M. & S. 415. See tit. "*Quarter Sessions*."

(t) *Apleford's case*, 1 Mod. 84, per Hale, C. J., cited in *Philips v. Bury*, 4 Mod. 122. S. C. 2 T. R. 351. See also *R. v. St. John's Coll.*, 4 Mod. 236, and 9 B. & C. 21.†

(u) Ante, p. 273, n. (b). *R. v. Alsop*, 2 Show. 170. S. C. 2 Jones, 175.

(v) *Dr. Walker's case*, Cas. t. Hard. 211; Andr. 178, in marg.; 3 Bac. Abr. 529, 536, 3rd edit., or tit. "*Man.*" (B.), S. C. See tit. "*Courts Inferior*" (*Judgment, &c.*)

(w) Cas. t. Hard. 211; B. R. H. 212; Com. Dig. tit. "*Man.*" (B.) See post, tit. "*Writ*" (*Form*).

(x) *R. v. Kent (J.)*, 14 East. 395. *R. v. Cumberland (J.)*, 1 M. & S. 193. *R. v. Heywood*, 1 M. & S. 624. See tits. "*Act of Parliament*," "*Quarter Sessions*" (*Justices*).

(y) Ante, p. 12. *R. v. Canterbury (Archbishop)*, 15 East, 126, citing 14 East, 395; 1 M. & S. 190. See tit. "*Visitor*."

WATER-BAILIFF.] See title *Severn, Water Bailiff of*.

WATER-HOUSE, MASTER OF.] The writ lies not for the master of the water-house of the Lord Mayor, for it is more a service than an office.(z)

WATERWORKS.] The writ lies not for the office of waterworks in London.(a)

WAY.] See titles *Canal; Footway; Highway; Inclosure; Railway; Road*.

WEIGHTS AND MEASURES.] *Inspector; Recompense.*—The writ has been granted to command justices of the peace in Quarter Sessions, to allow, under stat. 37 Geo. 3, c. 143, s. 1, a duly appointed examiner of weights and measures, a reasonable recompense or satisfaction for his trouble in the execution of the said office.(b)

—.] —. *Accounts.* The writ also lies, under stats. 5 & 6 Wm. 4, c. 63, and 5 & 6 Wm. 4, c. 76, to command an investigation of the accounts of an inspector of weights and measures, and to make an order for the reasonable remuneration of him for such inspection.(c)

WESTMINSTER, HIGH BAILIFF OF.] *Admission.*—The writ lies to command the dean and chapter of Westminster to admit to the office of high bailiff of that city, because there the bailiff is a ministerial officer, and makes returns of writs in his own name.(d) So, if the high steward of Westminster name one to be bailiff, and the dean, &c. name another, the Court will grant a mandamus to the appointee of the high steward, but without prejudice to the dean, &c.(e)

***WHITSTABLE, FREEFISHERS, &c., OF.]** *Restoration.*—The writ lies to command the restoration to the office of freeman of the [*277] Company of freefishers and Dredgers of Whitstable, &c., if improperly removed.(f)

(z) Cited in He's case, 1 Vent. 143. Com. Dig. tit. "Man." (B.) Bac. Abr. tit. "Man." C. See tit. "Office."

(a) Hurst's case, 1 Keb. 554. See tit. "Office" (Public), (Freehold).

(b) R. v. Devon (J.), 1 B. & A. 588. See tits. "Coroner," "Quarter Sessions" (Justices), "Salary."

(c) R. v. Hull (Recorder), 3 N. & P. 595. S. C. 8 A. & E. 638.† See tits. "Accounts," "Act of Parliament."

(d) Ante, p. 12. R. v. Westminst. (Dean), Comb. 241. S. C. 4 Mod. 281. The former report says that the franchise is in the Dean and Chapter, but quare if they shall answer if the bailiff be insufficient. Vide Noy, 69, Dean, &c. of St. Paul's case. Bac. Abr. tit. "Man." C. See tit. "Office" (Admission).

(e) Knipe v. Edwin, 4 Mod. 281. S. C. Comb. 241. Owen v. Saunders, Ld. Raym. 159, &c. See tits. "Deputy Officer," "Office."

(f) Ante, p. 12. R. v. Whitstable (Freefishers), 7 East, 353. S. C. 3 Smith,

WIGAN, INN BURGESS OF.] See title *Burgess (Inn Burgess of Wigan.)*

WILL.] This subject is arranged as follows:—

PROBATE.					PROBATE.				
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Rule	-	-	-	-	278	Renunciation	-	-	279
Form of Writ	-	-	-	-	278	Stamp	-	-	279
Returns	-	-	-	-	278	Will	-	-	279
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Insolvency	-	-	-	-	278	Transmission	-	-	280
Appraisement	-	-	-	-	279	Enrolment	-	-	280
Incapax	-	-	-	-	279				

—.] *Probate, Grant of.*—As an executor has a temporal interest in a probate, and without it cannot sue, &c., so the writ of mandamus lies to command the granting of it, by those whose duty it is so to do, as the ordinary, (g) or the Judge of the Prerogative, (h) or other Ecclesiastical Court. (i) So, the writ has been granted to command the mayor of Oxford to prove a will. (j)

The writ will also be granted to command such persons or inferior jurisdictions to proceed to prove a will, &c., for the stat. 21 Hen. 8, c. 5, enacts, “that probate is to be granted with convenient speed without any frustatory delay.” (k)

*—.] *Rule.*—In one case, the rule for a writ to command [*278] the grant of probate, was made absolute in the first instance, on account of the inconvenience of a delay in a matter of this nature. (l)

—.] *Form of Writ.*—If a writ of mandamus to the Prerogative Court of Canterbury, state, that “the testator had bona notabilia at Westminster and in divers dioceses,” but do not say “within the province of Canterbury, it is sufficient; for the Court of B. R. will not presume the

319. See tits. “Company,” “Franchise,” “Freedom” (Company, Restoration), “Freeman,” “Office” (Restitution).

(g) Ante, p. 9—12. R. v. Bettesworth, Fitzg. 125. Fortre v. Fortre, Holt, 42; 1 Show. 351. Boon's case, 1 P. 1652, cited in R. v. Patrick, 2 Keb. 66. R. v. Raines, 12 Mod. 205. S. C. 1 Salk. 299. S. C. 3 Salk. 162. S. C. Holt, 310. S. C. Ld. Raym. 361. Blackborough v. Davis, Holt, 43. S. C. 1 Salk. 251. Dunkin v. Mun, Raym. 236; Trem. Pl. Cor. 501, where see form of writ; Bac. Abr. tit. “Man.” (D.) and n. See tits. “Administration” (When granted), “Certificate,” “Excise” (Permit), “Leetureship” (License).

(h) Ante, p. 12, 33, n. (f). Luskins v. Carver, Sty. 7, 8, (citing Countess of Berkshire's case, 11. 20 Jac., and St. Burien's case.) also cited in Patrick's case, Raym. 103. R. v. Simpson, 1 W. Blac. 455. S. C. Burr. 1463. R. v. Dr. Hay, 1 W. Blac. 455. S. C. Burr. 2295. R. v. Raines, Carth. 457. Dunkin v. Mun, Raym. 235. Anon., 2 Roll. 107. R. v. Raines, 12 Mod. 205. R. v. Raines, 3 Salk. 232, 11. R. v. Bettesworth, Stra. 856. Com. Dig. tit. “Man.” (A.) See tits. “Courts Inferior.”

(i) Ante, p. 33, n. (g). Anon., 2 Show. 48, citing Fitzg. 202. Duncomb's case, Sty. 22. Anon., 1 Vent. 335. Offley v. Best, 1 Lev. 187. R. v. Surrey (J.), 2 Show. 74. Com. Dig. tit. “Man.” (A.) See tit. “Office” (Enforcing Duties).

(j) Ante, p. 9, 12. Dunkin v. Mun, Raym. 236. Vide F. N. B. 290 a.

(k) Ante, p. 9. Dunkin v. Mun, Raym. 235. S. C. 3 Keb. 348, citing F. N. B. 63, Chrism's case and Gold's case. See tit. “Act of Parliament,” “Administration.”

(l) See ante, p. 221, n. (o). Justice v. Jones, 1 Barn. 280. See tits. “Burial,” “Corpse,” and post, tit. “Rule.”

existence of an inferior jurisdiction; (m) such Court, in giving judgment, said, that "they had decided, (n) that they (the Court at Westminster) were bound to take notice under what ecclesiastical jurisdiction they sat." (o)

——. *Returns, Lis Pendens.*—It is clearly settled, that the pendency of a suit in the Ecclesiastical Court, concerning the validity of the will, is a sufficient answer and return to a mandamus to grant probate of it, (p) or for the application for the rule, if such a fact appear upon the affidavits. (q) But the Court will not supersede the writ, if it should have issued before the will was litigated. (r)

——. *Insolvency, &c.*—It is not a good return to such a writ, that probate is denied, because the executor is in indigent or insolvent circumstances; nor can the inferior Court, in such a case, require him to give security for the due performance of the will; for the testator is the proper and only judge of the qualifications of his executor. (s) So that a return that the prosecutor would not give caution or security, [*279] being an insolvent or bankrupt, is bad. (t) *The Court will not, however, command the issuing of probate, although the will be not in contest, if it be merely delayed till the executor render an account of his testator's estate, his testator having been an administrator during minority, &c. (u)

(m) *R. v. Bettesworth*, Stra. 857. See post, tit. "Writ" (Form).

(n) *Adams v. Savage*, cited in 1 Barn. 299.

(o) *R. v. Bettesworth*, 1 Barn. 299.

(p) Ante, p. 22, 23. *R. v. Hay*, Barr. 2295, cited in 6 T. R. 302. *R. v. Bettesworth*, Stra. 857. S. C. Andr. 365. *R. v. Bettesworth* (Dr.), 1 Barn. 299, per Reynolds, J. S. C. 2 Barn. 234. S. C. Stra. 956. S. C. 2 Keb. 139. Anon., 5 Mod. 374. See *R. v. Harris*, (Dr.), 1 W. Blac. 430. *Lovegrove v. Bethell*, 1 W. Blac. 668; Wms. Exors. 283; Stra. 1111; Com. Dig. tit. "Man." D. 3. *Gray v. Tench*, Comb. 454. See tits. "Administration, Letters of" (Return, *Lis pendens*), "Churchwarden" (Return, *Lis pendens*).

(q) Ante, p. 36, n. (h). *Lovegrove v. Bethell*, 1 W. Blac. 668. *Dunkin v. Mun*, 1 Vent. 135. S. C. Raym. 235. *R. v. Raines*, 1 Salk. 299. S. C. Carth. 457. See post, tit. "Application" (Rule, Affidavits).

(r) Ante, p. 36, n. (h). *R. v. Dr. Bettesworth*, 7 Mod. 218. S. C. 2 Barn. 420. S. C. Andr. 365. S. C. Stra. 857. S. C. 1 Barn. 291, 331, 424. Anon., 5 Mod. 374. See post, tit. "Supersedeas."

(s) Ante, p. 71, n. (b). *R. v. Raines*, 12 Mod. 205. S. C. 12 Mod. 136. S. C. 1 Salk. 299. S. C. Carth. 457. S. C. 3 Salk. 162, 233. S. C. Holt. 310. S. C. 3 P. Wms. 337, n. (B). S. C. Ld. Raym. 361. *R. v. Bettesworth*, Stra. 857. S. C. Fitzg. 125. *Justice v. Jones*, 1 Barn. 289. *R. v. Bettesworth*, 1 Barn. 298. *R. v. Simpson*, 1 W. Blac. 456. S. C. Barr. 1463. *Hathornwaite v. Russell*, 2 Atk. 126. *Hills v. Mills*, 1 Show. 293. S. C. 1 Salk. 36. S. C. Comb. 185. S. C. Skin. 299. S. C. 12 Mod. 9. S. C. Holt. 305. *Dunkin v. Brown*, 3 Keb. 350, 351; 1 Bac. Abr. tit. "Man." (D), n.; 2 Bac. Abr. 377; Wms. Exors. 284. See tit. "Churchwarden" (Return, *Pauperism*).

(t) *R. v. Raines*, 1 Salk. 299, and cases there cited. S. C. 3 P. Wms. 336, n. (B). S. C. Carth. 457. S. C. 3 Salk. 162. *R. v. Bettesworth*, 1 Barn. 299, per Page, J. *Luskus v. Carver*, Sty. 8, 9, and cases there cited. See also *Patrick's case*, Raym. 103; Com. Dig. tit. "Man." (A.); Wms. Exors. 284. And see tit. "Administration" (When granted).

(u) Ante, p. 34, n. (r). (x). *Dunkin v. Dunkin*, 3 Keb. 344. See *Sand's case*, 4 Car. 1, 1 Sid. 179. And see tit. "Administration" (When granted).

—.] *Appraisement*.—A return of the pendency of the commission of appraisement has been held not to be good; for the Spiritual Court cannot restrain probate for this cause.(*v*) But where the will is under litigation, then commissions of this sort are reasonable, to protect the estate.(*w*)

—.] *Incapax*.—To such a mandamus, a return of "incapax" of the executor, has been held not to be good.(*x*)

—.] *Non Compos*.—It was at one time doubtful whether "non compos" of executor was a good return, but more recent decisions shew, that as such an affliction is a natural disability, so administration cum testamento, &c. may be granted in such a case;(y) such a fact is therefore a good return. So, a grant, &c., to such an one, would be an entirely vain and fruitless act, which the Court of B. R. will not put itself in motion to effect.

A return that *probate is restrained according to practice* is bad, unless such practice be founded upon stat. 21 Hen. 8, c. 5, for the Ecclesiastical Court cannot set up their practice against the law of the land.(z)

—.] *Renunciation*.—The writ lies to allow an executor to retract his renunciation of the executorship, and to command a grant of a joint probate to him and his co-executor.(a)

—.] *Probate, Stamp*.—The writ has been granted to command the commissioners of stamps to repay a sum of money received by them in excess of the proper probate duty.(b)

—.] *Will, Delivery*.—The Court of B. R. will not command the [*280] Prerogative or other Court to deliver out to an heir or devisee a will of land, there being no precedent for such a writ, and because he has another and specific legal remedy by detinue or action upon the case, by which Twysden, J., remembered to have been brought for that cause.(c) But it seems the Court would command the delivery out of such will after it had been first proved per testes.(d)

(v) Ante, p. 12. R. v. Bettsworth, Stra. 857. S. C. Fitzg. 125. Justice v. Jones, 1 Barn. 289. S. C. 1 Barn. 298, nom. R. v. Bettsworth. Dunkin v. Mun, Raym. 235; Wms. Exors. 284. See tit. "Administration."

(w) 1 Barn. 299, supra, n. (v); see supra, "Returns of Lis pendens, Insolvency," &c., and ante, p. 34, n. (w), (x).

(x) R. v. Raines, 1 Salk. 299. S. C. Ld. Raym. 366. Hills v. Mills, 1 Salk. 36, and cases there cited; and see cases in next note. See tit. "Office" (Admission, Return not qualified), (Restoration, Return, Incapacity to execute Office).

(y) Ante, p. 15, 16. R. v. Raines, 1 Salk. 299. S. C. Ld. Raym. 361. S. C. Holt, 316. Hills v. Mills, 1 Salk. 36. S. C. 1 Show. 295, n. (h). S. C. Holt, 395. S. C. Comb. 185. S. C. Skin. 299. S. C. 12 Mod. 9, and cases there cited. Price v. Parker, 1 Lev. 158, per Twysden, J. Osley v. Best, 1 Lev. 186. S. C. 1 Sid. 293. S. C. 1 Sid. 371, 373. Dunkin's case, 3 Keb. 348, 350. S. C. Raym. 235. Pierce v. Perks, 1 Sid. 289, per Twysden, J.

(z) Ante, p. 34, n. (w), (x). R. v. Bettsworth, Stra. 857. Wms. Exors. 284. See tit. "Quarter Sessions" (Appeal).

(a) R. v. Simpson, 1 W. Blac. 455. S. C. Burr. 1463; Anon., 1 Vent. 335.

(b) R. v. Stamp Commissioners, 6 Q. B. 657, 7. S. C. 16 L. J. N. S. 75. Q. B., where see a form of writ. See tit. "Constable" (Reimbursement), "Drainage" (Reimbursement), "Highway" (Surveyor, Reimbursement).

(c) Ante, p. 18—27. Savill's case, 2 Keb. 619. S. C. nom. Sabine's case, Sid. 443.

(d) 2 Keb. 616. S. C. Sid. 443, supra, n. (c); and see Anon., Comb. 289.

—.] *Transmission, &c.*—It seems that, on a proper case, the writ would be granted to command the commissary of an archdeacon to transmit an original will to the Judge of a Bishop's Court, and to leave it there for the purpose of having administration granted.(*e*)

—.] *Inrolment.*—The writ has been granted to command a company to make in a book kept for that purpose, an entry of the probate of a will, and of the name and place of A. H. as the owner, proprietor or person entitled to a share in the profits of the company belonging to the testator at the time of his death.(*f*)

The writ lies to command the mayor of a borough to enrol a testament, which by custom ought to be enrolled.(*g*)

WITNESS.] The writ does not lie to command a county treasurer to pay the expenses of a witness in a case of felony pursuant to an order of sessions, the proper remedy being by indictment or by attachment, in the inferior Court and not by mandamus.(*h*)

WOODWARD OF LONDON.] *Restoration.*—The writ of mandamus has been granted to command restoration to the public office of woodward of the city of London, its duties being, to take care that the wood and coal for the use of the City of London be kept according to the proper assize.(*i*)

WOOD WHARF YEOMAN.] See title *Yeoman of Wood Wharf*.

WORKS.] The writ lies to command the performance of works, under and according to the provisions of an act of Parliament, provided there be no specific legal remedy.(*j*)

*YEOMAN OF WOOD WHARF.] *Restoration.*—The writ lies to command restoration to the office of yeoman of the wood wharf, it being both an ancient public office, and a freehold.(*k*) [^{*281}]

YORK, SHERIFFS' COURT OF.] See titles *Attorney; Courts Inferior (Sheriffs); Sheriffs*.

(*e*) R. v. Yonge, 5 M. & S. 120.

(*f*) Ex parte Horne, 7 B. & C. 632.† See tits. "Books," "Company" (Share).

(*g*) Bishopp's case, 2 Roll. 106; Com. Dig. tit. "Man." (A.) See tit. "Custom."

(*h*) Ante, p. 20. R. v. Surrey (Treasurer), 1 Chit. 650.† See the practice as to an attachment in such case, *id.* n. (*u*). R. v. Jeyes, 3 A. & E. 419.† S. C. 5 N. & M. 101.† S. C. 1 H. & W. 325. See tits. "County" (Treasurer), "Courts Inferior" (Judgment, Execution, &c.). "Office" (Ministerial, Inferior), (Officers of Courts).

(*i*) Anon., 1 Barn. 123, 135, 154. Schriiven's case, Stra. 832; Bac. Abr. tit. "Man." (C.) See tit. "Office" (Public).

(*j*) Ante, p. 18—27. R. v. Eastern Counties Railway, 10 A. & E. 557.† S. C. 4 P. & D. 48. R. v. Wells (Mayor), 4 D. 562. See tits. "Act of Parliament," "Company," (Directors, Duties, &c.), "Dock," "Inclosure," "Railway" (Duties, &c.).

(*k*) Ante, p. 12. Schriiven case, Stra. 832, cited in R. v. London (Mayor), 11, 6 Geo. 2; B. R. 2 T. R. 182, n. (*h*); Com. Dig. tit. "Man." (A.) Bac. Abr. tit. "Man." (C.) See tit. "Office" (Public), (Freehold), "Water House" (Master of).

The above alphabetical series is supposed to embrace the substance of all that the reported cases, from the earliest period, down to the 7 Q. B. Reports inclusive, contain upon the subject of "*Mandamus*."

[*282]

*CHAPTER THE FOURTH.

OF THE APPLICATION TO THE COURT, AND RULE FOR THE WRIT OF MANDAMUS.

HAVING in the preceding pages stated the legal principles which govern the dispensation of the Writ of Mandamus, together with an alphabetical series of the subjects, in respect whereof it has been either granted or denied, we now proceed to treat of those practical proceedings, by means of which such writ is obtained.

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1st. APPLICATION, PROCEEDINGS PREVIOUSLY TO.] *Demand and Refusal*.—It is an imperative rule of the law of mandamus, that, previously to the making of the application to the Court for a writ to com-
 [*283] mand *the performance of any particular act, an express and distinct *demand* or request to perform it, must have been made by the prosecutor to the defendant, who must have *refused* to comply with such demand, either in direct terms, or by conduct from which a *refusal* can be conclusively implied; it being due to the defendant to have the option of either doing, or refusing to do, that which is required of him,

before an application shall be made to the Court for the purpose of compelling him. Both the demand and refusal must also be shewn on the affidavits made use of in support of the application for the rule.(a)

—.] *Demand, by whom made.*—The demand may be made either by the prosecutor personally, or by some one by him duly authorized.(b)

—.] *Demand, when to be made.*—The demand should not be premature as to *time*: thus, in the case of the execution of works by a railway company, under an act of Parliament,(c) unless such demand be made after completion of the objectionable work by the company; and thereupon compliance be refused, either in direct terms or virtually, a mandamus will not be granted, though the act of Parliament have been palpably disobeyed, and though the time assigned for the performance of the work have elapsed; because, as the benefit of such an act may be waived by the prosecutor, so, if there have been an acquiescence when the works were finished, and no specific complaint made, it may be, according to the circumstances, that such conduct may operate as a waiver by the prosecutor, notwithstanding he may have complained of the improper nature of the works whilst they were proceeding; because such complaint, though a proper precaution, does not excuse the omission of a specific demand after the completion, which demand should be expressive of what the prosecutor considers to be the effect of the act, &c.

*—.] *Demand, to whom made.*—The demand must be made *personally* to those from whom the duty, &c. is required.(d) With [*284] respect, however, to applications to justices of the peace individually, to do certain acts which magistrates of that description are in general authorized to do, the generality of their authority, and the multitude of the persons invested with it, may be a sufficient reason for not requiring a previous application to *each*, before resort is had to the Court of B. R. to correct an improper refusal of either of them to act when duly called upon. But where *two* persons only are specially designated by the Legislature to do a certain act, it is not sufficient to found an application to the

(a) See ante, p. 52, n. (n), 84, n. (i). R. v. Brecknock Canal, 4 N. & M. 871.† S. C. 3 A. & E. 217.† S. C. 1 H. & W. 279. R. v. Ford, 2 A. & E. 588.† S. C. 4 N. & M. 451.† R. v. Beverley (Mayor), 8 D. 143. R. v. West Looe, 3 B. & C. 677.† S. C. 5 D. & R. 600.† per Bayley, J. R. v. Leicester (J.), 4 B. & C. 891.† S. C. 7 D. & R. 370.† R. v. Nottingham (J.), 3 A. & E. 503.† S. C. 5 N. & M. 160.† R. v. Frost, 8 A. & E. 826.† S. C. 1 P. & D. 75. See post, "Application" (Affidavits).

In most of the titles of the preceding series, as in that of Railway, instances can be found of the necessity of a demand and refusal.

(b) R. v. Ford, 2 A. & E. 588.† S. C. 4 N. & M. 451.† R. v. Frost, 8 A. & E. 822.† S. C. 1 P. & D. 75. R. v. West Looe (Mayor), 3 B. & C. 686.† S. C. 5 D. & R. 590.†

(c) R. v. Bristol Railway Company, 12 L. J., N. S. 106, Q. B. S. C. 4 Q. B. 162.† S. C. 3 G. & D. 834. See *tit.* "Railway" (Duties, &c., Rule).

(d) R. v. Stoke Damerel (Minister), 5 A. & E. 584.† S. C. 1 N. & P. 56.† R. v. Wiltshire Canal, 3 A. & E. 477.† S. C. 5 N. & M. 344.† R. v. Norwich Railway, 3 D. & L. 385. S. C. 15 L. J., N. S. 24, Q. B. See post, "Writ" (Direction).

Court for a mandamus, to shew that an application has been made to *one* of them only. *(c)*

—.] *Demand, Form of.*—The demand must be express and distinct, and not couched in general terms; *(f)* it should accurately demand a performance of that which the defendant legally can and should do. *(g)* Thus, where an act of Parliament empowers a company to execute works in a manner therein prescribed, and a party wishes to enforce the proper execution thereof by mandamus, he must, after the work is completed, specifically require the company to perform those things which, according to his opinion, the act requires. *(h)*

A demand in the alternative to do one of two, three, or more things, will, if the duty enjoined form one of them, and there shall have been a general refusal to comply with such demand, be sufficient. *(i)* In some cases, as an application to inspect documents, &c., the object of the demand should be stated, in order that the defendant may see the propriety of the prosecutor's purpose, and that such inspection, &c., has a proper and definite object, and not the gratification of mere curiosity. *(j)*

[*285] —.] **Demand; Affidavits.*—The demand must clearly appear to have been properly made, by the affidavits *(k)* used in support of the application, or the Court may refuse it.

—.] *Refusal, what, Form of.*—There must also, as before stated, have been a distinct refusal by the defendant to do the thing, or perform the duty, &c., *(l)* previously to the application to the Court for the writ.

As to the form of the refusal, it has been held, that it is not necessary that the word "*refuse*," or any equivalent to it, should be used by the

(c) R. v. London (Ep.), 13 East, 425. See ante, tit. "Lectureship" (Application), ante, p. 146, n. *(b)*.

(f) R. v. Ford, 2 A. & E. 588. S. C. 4 M. & N. 451,† and see R. v. Brecknock Canal, 3 A. & E. 217.† S. C. 4 N. & M. 871.† S. C. 1 H. & W. 279. S. C. 4 L. J., N. S. M. C. 105. R. v. West Looe (Mayor), 3 B. & C. 686.† S. C. 5 D. & R. 590.† See R. v. Stoke Damerel (Minister), 5 A. & E. 584.† S. C. 1 N. & P. 56,† and post, tit. "Return" (Certainty).

(g) R. v. Hughes, 3 A. & E. 425.† See a form of demand in R. v. Frost, 8 A. & E. 823.† S. C. 1 P. & D. 75. R. v. Kendall, 1 Q. B. 366.† S. C. 4 P. & D. 602. See post, "Writ" (Mandatory Clause).

(h) R. v. Bristol Railway, 4 Q. B. 162.† S. C. 3 G. & D. 384. S. C. 12 L. J., N. S. 106, Q. B. Ante, p. 283.

(i) R. v. St. Margaret's Parish, 1 P. & D. 116. S. C. 8 A. & E. 889.† S. C. 1 W. W. H. 673.

(j) Ante, p. 16, n. *(c)*. R. v. Wiltsh. Canal, 3 A. & E. 483.† S. C. 5 N. & M. 344,† n. *(d)*. R. v. Clear, 4 B. & C. 899.† S. C. 7 D. & R. 393.† See tits. "Books," "Manor" (Rolls Inspection).

(k) Ante, p. 283, n. *(a)*. Ex parte Carlton High Dale, 4 N. & M. 313.† R. v. Kendall, 1 Q. B. 366.† S. C. 4 P. & D. 602. R. v. Barker, Burr. 1265. S. C. 1 W. Blac. 300. See infra, "Refusal" (Affidavits), and post, tit. "Affidavits."

(l) See ante, p. 283, n. *(a)*. R. v. Bristol Railway, 12 L. J., N. S. 106, Q. B. S. C. 3 G. & D. 387. S. C. 4 Q. B. 162.† R. v. West Looe (Mayor), 3 B. & C. 686.† S. C. 5 D. & R. 590.† R. v. The Wilts. Canal, 8 D. 623. R. v. Montacute, 1 W. Blac. 60. S. C. 1 Wils. 283; 1 Barn. 59; Bac. Abr. tit. "Man." (D.)

defendant, but there should be enough, from the whole of the facts, to shew to the Court, that for some improper reason compliance is withheld, and a distinct determination not to do what is required; *(m)* thus, where the affidavits shewed a readiness by the defendant "to do the works, *if indemnified*," such was held not to amount to a *refusal*, as it left the case short of the point to which it would have been brought if such an application had been made, that any nonperformance afterwards must have amounted to a refusal; as the delivery of a notice, stating, "we desire a direct answer, and your not giving it will be considered a refusal;" for so direct an application would probably have led to a direct denial; therefore in similar cases such an application or something equivalent should have taken place, in order to furnish a ground for the writ. *(n)* So, the fact of taking reasonable time to consider before fulfilling the demand, does not amount to a *refusal*; for the prosecutor should, in such a case, apply again to the defendant, in order to obtain an answer, which shall shew that the defendant has exercised *his* judgment on the demand. *(o)* So, in a case where certain books were offered for ^[*286] inspection as a matter of favour, and not as of right, upon which right inspection was demanded, it was held, that although it might be important to assert the right, yet the prosecutor should have said, that "he accepted the liberty of inspection *as of right, and not as of favour*;" if, thereupon, the books had been withheld, such would have amounted to a refusal. *(p)*

The Court has however held, that the rescinding of an original resolution on which a dispatch was framed, is equivalent to an absolute refusal to transmit such dispatch, and sufficient to authorize the Court to entertain the subject-matter of the mandamus. *(q)* So, an answer to a demand that the defendant "will not disobey the order of the Court of B. R.," amounts to a refusal to comply without such an order. *(r)* So, if it be clear from the acts of the defendant, that he does not intend to comply with the demand, a statement of the facts upon which such supposition of the prosecutor is based, will be considered by the Court as tantamount

(m) Ante, p. 283, n. *(a)*. R. v. Brecknock Canal, 3 A. & E. 217.† S. C. 4 N. & M. 871.† S. C. 1 H. & W. 279. S. C. 4 L. J., N. S., M. C. 105. R. v. Ford, 2 A. & E. 588.† S. C. 4 N. & M. 451.† R. v. East India Company, 4 B. & Ad. 537.† S. C. 1 N. & M. 335.† R. v. Kent (J.), 9 B. & C. 285, 287.† Ex parte Winfield, 3 A. & E. 614.† R. v. Bristol Railway, 4 Q. B. 162.† S. C. 3 G. & D. 387. S. C. 12 L. J., N. S., Q. B. 106. R. v. Thames Commrs., 8 A. & E. 901.† n. *(b)*. R. v. Middlesex (Archdeacon), 3 A. & E. 615.† R. v. Stoke Damerel (Minister), 5 A. & E. 584.† S. C. 1 N. & P. 56.† R. v. Norwich (Railway), 15 L. J., N. S. 24, Q. B. S. C. 3 D. & L. 385.

(n) 3 A. & E. 217.† S. C. 4 N. & M. 871.† S. C. 1 H. & W. 279. S. C. 4 L. J., N. S. 105, M. C., supra, n. *(m)*. R. v. Wiltshire Canal, 3 A. & E. 483.† S. C. 5 N. & M. 344.† supra, n. *(j)* See ante, p. 283, n. *(a)*

(o) 3 A. & E. 483.† S. C. 5 N. & M. 314,† supra, n. *(n)*. R. v. Wilts. Canal, 8 D. 623. R. v. Kendall, 1 Q. B. 366.† S. C. 4 P. & D. 602.

(p) R. v. Northleach Roads, 5 B. & Ad. 982.†

(q) R. v. East India Company, 1 B. & Ad. 535.† S. C. 1 N. & M. 335, 349.† See tit. "East India Company."

(r) R. v. Middlesex (Archdeacon), 3 A. & E. 617.† S. C. 5 N. & M. 494.†

to a refusal.(s) So, a colourable adjournment or procrastination of the performance of an act for the purpose of delay, is equivalent to a refusal, and the Court will award the mandamus.(t) But the Court will not award the writ, where the refusal has been bona fide, or was justifiable at the time it was made.(u)

—.] *Refusal, by whom.*—The refusal must not only be clear, but must be made by those properly called upon to do the act, &c. Thus, the Court refused a mandamus to permit an inspection of books, &c. by a company, where there had been no refusal by the committee, although there had been a direct refusal by the clerk, in whose possession the books, &c. were, and notwithstanding that previously to such refusal by the clerk, upon an application having been made to the committee, they had given a qualified refusal.(v)

—.] *Affidavits.*—The refusal must clearly appear by the affidavits, in order that the Court may judge as to its sufficiency:(w) but the reasons *or grounds of the refusal need not be set forth; it is sufficient [*287] to state the fact of refusal, if express, or if inferential, the facts from which such refusal is inferred; and this practice also obtains in those cases where the rule is absolute in the first instance.(x)

—.] *When want of demand or refusal can be taken advantage of.*—The objection as to the neglect of a demand, or the absence of a refusal, should, in order to prevent a waste of time, be objected to in the first instance, viz. on shewing cause against the rule for the writ, and cannot be made after the merits of the case have been discussed.(y) In M. T., 3 Vict., Lord Denman, C. J., announced, that the Court of B. R. had come to a resolution not to entertain an objection to a rule for a mandamus, on the ground that there had been no refusal to do the thing required by the writ, unless such objection should have been taken at the the outset of the argument in shewing cause.(z)

—.] *NOTICE of Application to Court for writ.*—In general, no notice of the intended application to the Court for a rule to issue a writ of mandamus is necessary, previously to the making of such application, except in those cases in which it is either expressly required by statute,

(s) R. v. Birmingham Canal, 2 W. Blac. 708, and see R. v. Eastern Counties Railway, 10 A. & E. 561.† S. C. 4 P. & D. 48. See ante, p. 283, n. (a).

(t) R. v. St. Margaret, 1 P. & D. 116. S. C. 8 A. & E. 889;† and see 8 A. & E. 901,† n. (b).

(u) Ex parte Parkes, 9 D. 616.

(v) R. v. Wiltshire Canal, 3 A. & E. 483.† S. C. 5 N. & M. 344.† See also 3 G. & D. 386. S. C. 4 Q. B. 169.† supra. R. v. Middlesex (Archdeacon), 5 N. & M. 497;† and see R. v. Excise (Commissioners,) 6 Q. B. 981,† n. (b).

(w) Ante, p. 283, n. (a). Ex parte Carlton High Dale, 4 N. & M. 313.† R. v. Barker, Burr. 1265. S. C. 1 W. Blac. 300. And see supra, "Demand" (Affidavits).

(x) Ex parte Winfield, 3 A. & E. 614.† See post, tit. "Affidavits," and post, p. 298.

(y) R. v. Bristol Railway, 3 G. & D. 387. S. C. 4 Q. B. 171.† per Ld. Denman, C. J., citing R. v. The Eastern Counties Railway, 10 A. & E. 531, 545.† and n. (b). S. C. 4 P. & D. 48; 2 P. & D. 648; 1 Railw. Cas. 509.

(z) 3 P. & D. 123, n. (d).

&c.,(a) or in which the rule being absolute in the first instance, the practice of the Court directs, that notice of the intended application shall be given to the person against whom it is about to be made.(b)

2nd. APPLICATION FOR RULE.] *Nature of.*—The application to the Court of B. R., for a rule for a writ of mandamus, in all matters affecting the *public*, is *ex debito justitiæ*.(c) So if a statute, charter, &c., specially delegate to the Court of B. R. the power of enforcing certain duties and requirements by writ of mandamus,(d) or make the *granting of such writ matter of positive law, the applicant is, on [*288] a proper case, entitled to such writ *ex debito justitiæ*, and on such occasions the Court has no discretionary power either as to the granting or the withholding of it; neither can it either fetter nor delay it.(e)

Where, however, the right or power is of a *private* nature, as in the case of many offices, &c., in which the public are not primarily concerned, it is discretionary in the Court, in the first instance, either to grant or refuse the application;(f) or to grant a rule to shew cause why it should not issue. But where the granting of the application is in the discretion of the Court, such discretion must be, and is, governed by certain principles;(g) that is, agreeably to the justice of the case, and as the interests of the parties seem, in its judgment, to require;(h) thus, as a general rule, the Court will always refuse the writ, unless the defendant have acted wrongly.(i)

—.] *By whom made.*—In general all those who are legally capable of bringing an action, are also equally capable of applying to the Court of B. R. for the writ of mandamus; so all those who are legally deprived

(a) Ante, p. 167, n. (a), 183, n. (f). R. v. Jones, Str. 704. See stat. 6 & 7 Vict. c. 89, s. 5, App., and the different titles of the preceding series, where such notice has been held to be necessary, as tit. "Office" (Election, Notice of Application).

(b) Ex parte Winfield, 3 A. & E. 614.† As to when a rule for a writ is absolute, in the first instance, see the several titles of the preceding series, and *infra*, tit. "Rule."

(c) See ante, p. 56, n. (o). Bull. N. P. 199. Anon., 2 Barn. 237; Bac. Abr. tit. "Man." (E.). R. v. West Looe (Mayor), 3 B. & C. 683.† S. C. 5 D. & R. 590.† See ante, tit. "Burgess" (Election, Application).

(d) R. v. Greene, 6 A. & E. 548.† S. C. 1 N. & P. 631.† See tits. "Act of Parliament," "Charters," &c., and ante, p. 11.

(e) See ante, p. 54, n. (a). R. v. Evesham (Corp.), Kel. 244.

(f) See ante, p. 112, n. (e). Cas. t. Hard. 99; Burr. 2189. Anon., 2 Barn. 237; Bac. Abr. tit. "Man." (A.), (E.). R. v. Excise Commissioners, 2 T. R. 385. R. v. Clear, 4 B. & C. 899.† S. C. 7 D. & R. 393.† R. v. Croydon, 5 T. R. 714.

(g) R. v. London (Mayor), 1 T. R. 425, 426. R. v. Palmer, 8 East, 425. R. v. Buller, 8 East, 392; Bac. Abr. tit. "Man." (E.). R. v. Luton Roads Trustees, 1 G. & D. 251. S. C. 1 Q. B. 860.† R. v. Manchester Railway, 1 G. & D. 344. R. v. Excise Commissioners, 2 T. R. 381. R. v. London (Mayor), 2 T. R. 177. R. v. Griffiths, 5 B. & A. 731.† S. C. nom. R. v. Bristol (Mayor), 1 D. & R. 389.† Anon., 2 Barn. 236.

(h) R. v. Brewers' Company, 4 D. & R. 496.† S. C. 5 M. & R. 140, 153. R. v. Paddington Vestry, 9 B. & C. 461.† R. v. Eastern Counties Railway, 10 A. & E. 543.† R. v. Excise Commissioners, 2 T. R. 385. R. v. Buckinghamsh. (J.), 1 B. & C. 489.† 9 B. & C. 461.†

(i) R. v. Chester (Ep.), 1 T. R. 403.

of the power to bring an action, are also equally prevented from applying for such writ.(j) Thus the writ will not be granted at the instance of a man outlawed, until the outlawry has been reversed; and it has been held, that such reversal must be shewn on the writ, for the Court cannot otherwise take notice of it;(k) therefore the outlawry of the prosecutor is a good return.

The application for the rule, &c., must be made by him or them who has or have the *immediate right* to the subject-matter of the writ; therefore it will not be entertained, but dismissed, if made by those who have but a remote interest in the subject. Thus where a controversy existed [289] in a municipal corporation, between the freemen under the old *charter, and the town council, under stat. 5 & 6 Wm. 4, c. 76, as to the exclusive right of the former to some corporation property for their own private use, respecting which a public meeting of the freemen had been held, and a resolution carried, at the instance of A., a freeman, "that the rents should be paid into the hands of the defendant, to wait until the claim of the freemen should be decided." The rents having been so paid, and a rule nisi having been obtained by A., as a freeman burgess, and inhabitant of the borough, liable to contribute to the borough rate, for a mandamus to the defendant to pay over the money into the hands of the treasurer of the borough; the Court discharged the rule, and held that the parties to apply in such a case were the town council, treasurer, or other authorized party, and not any individual having a remote interest in the corporation funds.(l) So an application to restore a deputy officer who has been wrongfully deprived, will be refused, if it be made at the instance of such deputy, because the party who is *immediately* concerned in interest, is the appointor of the deputy, for it is freehold which is concerned.(m)

When an application is made, the object of which is to obtain the benefit of certain provisions of an act of Parliament, &c., those for whose benefit such provisions were inserted in the act, &c., should be the applicants for the rule, although they may be neither specially nor nominally mentioned. Thus the Court has granted a mandamus to appoint overseers for a hamlet, upon an affidavit that there were poor belonging to it, notwithstanding that the act (13 & 14 Car. 2, c. 12), does not specifically state who is to enforce the appointment.(n)

If necessary, the writ may be obtained on the application of one who is

(j) See ante, tit. "Crown Customs," "Manor" (Royal), "Visitor."

(k) R. v. Bristol (Mayor), 1 Show. 288. S. C. nom. R. v. Rowe. (Carth. 199. S. C. Comb. 145; Com. Dig. tit. "Man." (B.) See post, tits. "Writ" (Form of) "Return." And ante, p. 27, 28.

(l) Ante, p. 94, n. (a). R. v. Frost, 1 P. & D. 75. S. C. 8 A. & E. 822.† S. C. 1 W. W. & H. 664; 2 Jur. 966. R. v. Witham Savings' Bank, 1 A. & E. 321.† S. C. 3 N. & M. 416.† The stat. 1 W. 4, c. 21, does not affect the law concerning the parties by whom a mandamus must be prosecuted. R. v. Edleston (Overseers), 1 N. & P. 20.† S. C. W. W. & D. 163.

(m) See ante, p. 178, n. (o), 252 (o), and see tit. "Office" (Restoration).

(n) Ante, p. 32, n. (w). R. v. Cumberland, 1 M. & S. 193. R. v. Westmoreland, 1 Wils. 138. R. v. Kent, (J.), 14 East, 395. See tit. "Overseers."

bound to make a return to it. Thus, a writ of mandamus to the overseers and churchwardens of a parish to make a poor's rate, may be issued on the application of one of the overseers, where it appears by affidavit that the other overseer has refused to concur in making the rate; and it has been held, that the stat. 1 Wm. 4, c. 21, makes no difference as to the parties who may obtain the writ.(o)

In certain cases where no particular person has been interested, the Court has granted the writ,(p) in order to avoid a defect of police.

*—.] *Against whom made.*—The application for the rule [*290] should be made against all those, if more than one, whose duty it will be to execute the writ, if it should ultimately issue;(q) thus if several persons form but one artificial person or officer, they must all be made the subject of the same rule.(r) The application should clearly disclose to the Court in what official capacity, if any, the writ is intended to be directed.(s)

As to an application against the Crown, see titles *Crown*; *Customs*; *Manor (Royal)*.

—.] *When to be made.*—The application for the rule should not be premature as to time; for the Court will not grant it before the proper time for the application shall arrive, for until then it cannot be ascertained but that the defendant will proceed regularly.(t) Thus, the Roman law has a rule, that “nihil peti potest ante id tempus, quo per rerum naturam persolvi possit; et cum solvendi tempus obligationi additur, nisi, eo præterito, peti non potest.”(u) The general rule, however, as to the time of the application, is, that it must be made within a *reasonable* time, after the default, neglect of duty, &c., especially if the applicant have another, though not so efficacious a remedy as by writ of mandamus.(v)

If the proper time for the doing of the act, &c., cannot be ascertained, the mandamus will be granted *immediately upon default*, if it be shewn that by a refusal of it great public inconvenience may accrue;(w) and it has been held to be no ground of refusing an application for a writ to

(o) Ante, p. 220, n. (e), 221, n. (q). R. v. Gadsby, 1 N. & P. 572.† Anon., 2 Chit. 254.† See stats. 1 Wm. 4, s. 21, (E.), and 9 & 10 Vict. c. 113 (I.), App.

(p) See ante, p. 32, n. (w), and supra, n. (n). Town of Nottingham's case, Bull. N. P., tit. “Man.” Gude's Cr. Pr. 181. See tit. “Act of Parliament” (Application).

(q) R. v. King's Lynn (J.), 3 B. & C. 149, 152; Bull. N. P. 195. R. v. Clerkenwell (Parish), Bull. N. P. 200. See ante, p. 284, n. (e), 286, n. (r).

As to those who are subject to the writ, see ante, p. 29, and the several titles of the alphabetical series.

(r) R. v. Middlesex (Archdeacon), 3 A. & E. 615. S. C. 5 N. & M. 494.

(s) Papillon's case, Skin. 64. R. v. West Looe, 3 B. & C. 685. S. C. 5 D. & R. 592. Bac. Abr. tit. “Man.” (F.)

(t) R. v. Attwood, 4 B. & Ad. 484. R. v. Bumstead, 2 B. & Ad. 699. R. v. Milverton, (Manor), 3 A. & E. 285. R. v. Kent (J.), 9 B. & C. 286. R. v. London Railway, 15 L. J., N. S. 42, Q. B. S. C. 3 D. & L. 399.

(u) Celsus, lib. 12, D.; D. 50, 17, 186.

(v) See ante, p. 87, n. (h), 184, n. (h).

(w) 3 A. & E. 286, supra, n. (t). See tits. “Alderman” (Election, Application), “Burgess Roll” (Application).

command the execution of the powers of an act of Parliament, that the period of time with reference to which such powers are limited, has expired.(x)

The grounds of prematurity are as various as the requisites necessary to complete the prosecutor's right, as want of notice of application, where such is necessary,(y) or the absence of a demand or refusal.

[*291] *If the application for the rule be moved for prematurely, it will be dismissed, with costs.(z)

There is no limitation of time within which an application for a rule for a mandamus need be made, except that it should be within a *reasonable time*; but if the applicant improperly delay such application, the Court will refuse to interfere, agreeably with the rule, "*vigilantibus non dormientibus jura subserviunt.*"(a)

As before stated, the only rule as to the time within which an application for the writ must be made, is, that it must be made within a *reasonable time* after the right has accrued, such reasonable time to be ascertained by a consideration of the circumstances of each particular case. Thus, where allotments had been set out under an inclosure act, to a party claiming them, and possession given about the year 1817, but no road had been made to them, nor any access but through allotments made, or land sold under the act to other persons. On motion in 1829, for a mandamus to the commissioners, who had not then published their award, to set out an occupation road to the first mentioned allotments, the Court held, that the application came too late.(b) So the Court has refused to command a Court of Quarter Sessions, touching the erection of a road gate, after a lapse of twenty-six years after the erection, leaving the prosecutor to proceed by indictment for the nuisance, or by an action of trespass, if his passage were obstructed.(c) So the Court has refused an application for a writ to command a canal company to enrol, according to their act of Parliament, certain contracts, &c., relating to certain lands purchased by the company, after a lapse of sixty-five years from the time of such purchase, during which no applicaiton had been made to the company.(d) So the Court has refused an application for a writ to make a rate to reimburse inhabitants on whom a fine has been levied for non-

(x) See ante, p. 32, n. (f), 87, n. (j).

(y) See ante, p. 287, n. (a), (b), supra, n. (t). In re Lodge, 2 A. & E. 124, n. (b); 3 A. & E. 286, n. (d).

(z) See post, tit. "Costs."

(a) Ante, p. 290, n. (r). R. v. Leeds Canal, 11 A. & E. 321. S. C. 3 P. & D. 174. R. v. Chesh. (J.), 15 L. J., N. S. 114. M. C. R. v. Derbysh. (J.), Nolan, 29. R. v. West Riding (J.), 1 G. & D. 706. S. C. 6 Jur. 506. S. C. 11 L. J., N. S. 80, M. C. See the several titles of this Work as to whom the application in each case is to be made.

(b) Ante, p. 290, n. (r), and supra, n. (a). R. v. Cockermouth Enclosure, 1 B. & Ad. 378, 389. R. v. Stainforth Canal, 1 M. & S. 32. R. v. Ellis, 2 D., N. S. 361. R. v. McKay, 4 B. & C. 658. R. v. Lancash. (J.), 12 East, 365, 370. R. v. St. Paul's Parish, 1 M. & R. 596. Ex parte Scott, 8 D. 329.

(c) R. v. Cambridgesh. (J.), 1 D. & R. 325. See tit. "Highway" (Toll).

(d) Ante, p. 60, n. (a).

repair of a highway, after an interval of eight years.(c) So the Court will refuse the writ, if the parties who apply have been guilty of great negligence or *laches*, or *where one of the applicants only is in [*292] fault.(f) But where after the assessment by a jury, under a local act, and during a dispute of title, three years elapsed, such a lapse was held to be no ground for refusing the writ.(g)

The Court will require greater promptness in the application, if the applicants have another remedy, but which may not be so efficacious as the writ, as by ejectment.(h) If, however, the application, under all the circumstances of the case, be not made within a *reasonable* time, but the delay is accounted for, the Court will grant the rule.(i)

—.] *Affidavits in support, when necessary.*—In a matter of right, as for instance, where a mandamus is prayed to restore a man, &c., the Court does not require, although it is usually supplied with, an affidavit of the fact; but where the writ is asked upon a supposed failure of duty, then the Court requires an affidavit;(j) for such a writ is never granted merely for asking, some reason must be assigned for it,(k) which is done by the disclosure of a sufficient case upon affidavits.(l)

—.] *What they should contain.*—The affidavit should plainly state in what official capacity, if any, it is intended the writ should issue against the defendants.(m) They should also set forth the whole facts of the case, in order that the Court may see that the prosecutor is entitled [*293] to the writ;(n) that is, what duty, &c. has been *neglected,(o)

(c) *R. v. Lancash. (J.)*, 12 East, 366. And see *R. v. Stainforth Canal*, 1 M. & S. 32, where it was held, that the application to command a compensation must be made within a *reasonable time*.

(f) See *supra*, n. (b), (c), (d), (e). *R. v. Fowey*, 4 D. & R. 140.† S. C. 3 B. & C. 584.† *R. v. Evesham (Mayor)*, 8 A. & E. 270.† S. C. 3 N. & P. 351.

(g) *R. v. Deptford Pier*, 1 P. & D. 128. S. C. 8 A. & E. 910.†

(h) *R. v. Stainforth Canal*, 1 M. & S. 32. See *ante*, p. 18—27, 290, n. (v).

(i) 1 M. & S. 33, *supra*, n. (h). *R. v. Fowey (Mayor)*, 4 D. & R. 140.† S. C. 3 B. & C. 584.† S. C. 5 D. & R. 614.†

(j) *Ante*, p. 167, n. (x), 193, n. (t). *R. v. Cory*, 3 Salk. 230, 6. *R. v. Cutlers' Company*, Cas. t. Hard. 129. See tit. "Affidavits," post, as to general form of affidavits.

As to the necessary affidavits in each particular case, see the several subjects of the Alphabetical Series. As to filing affidavits, see, post, tit. "Affidavits" (Filing).

(k) *R. v. London (Mayor)*, 1 T. R. 425, 426. *R. v. Palmer*, 8 East, 425. *R. v. Buller*, 8 East, 392. Bac. Abr. tit. "Man." (E.) *R. v. Luton Roads Trustees*, 1 G. & D. 251. S. C. 1 Q. B. 869.† *R. v. Manchester Railway*, 1 G. & D. 344. *R. v. Excise Commissioners*, 2 T. R. 381. *R. v. London (Mayor)*, 2 T. R. 177. *R. v. Griffiths*, 5 B. & A. 731.† S. C. nom. *R. v. Bristol (Mayor)*, 1 D. & R. 389.† Anon., 2 Barn. 236.

The formal requisites and general matters incident to all affidavits relating to mandamus will be found treated, post, tit. "Affidavits."

(l) 4 D. & R. 137.† *R. v. Fowey (Mayor)*.

(m) *Papillon's case*, Skin. 64. *R. v. West Looc*, 3 B. & C. 685.† S. C. 5 D. & R. 592.† Bac. Abr. tit. "Man." (F.) See post, tit. "Affidavits."

(n) *R. v. King's Lynn (J.)*, 3 B. & C. 147.† *R. v. Nottingham Waterworks*, 1 N. & P. 480.† S. C. 6 A. & E. 355. S. C. W. W. & D. 166. *R. v. Trinity House*, 9 D. 565.

(o) *R. v. North Riding (J.)*, 2 B. & C. 290.† S. C. 2 D. & R. 510.† *R. v. Eastern Counties Railway*, 10 A. & E. 557.† S. C. 4 P. & D. 48. See post, tit. "Writ."

or omitted; (*p*) but they will be sufficient, if they show no more than a probable cause or necessity for it. (*q*) If the affidavits do not disclose the existence of such a necessity for the writ, the Court will dismiss the application. Thus in a case in which, by agreement between the parties, an application was made for a mandamus, merely with the view to obtain the opinion of the Court, whether on the construction of a private act of Parliament, the proceeding by mandamus was a proper one; the Court stopped the argument, and refused to give any decision, because where there is a doubt as to the mode of proceeding under an act of Parliament, the parties must act on their own responsibility, and not come and ask advice from the Court, which is not bound to give them directions, before a matter is properly ripe for judicial determination. (*r*) Public justice and public convenience, should be the ground of the application, and the Court will not interfere, unless for the purpose of redressing some serious inconvenience. (*s*)

The prosecutor must, by his affidavits, shew his title to the writ, and support his case, with the best evidence in his power, or the Court will refuse the application for the rule; (*t*) thus where the application has relation to a corporation by prescription, &c., the constitution of it, as well as the applicant's right, must be verified by affidavit; (*u*) also when moving on behalf of any private corporation, care should be taken to ensure the production to the Court of the charter, &c., or a copy of it, with the affidavit of its verification, if necessary, for the Court cannot take notice of such a corporation, without being duly informed thereof. (*v*) Thus in one case the Court required the statutes of a college, although it appeared by affidavit, that application had been made to the college to inspect the statutes, and take a copy which had been refused; (*w*) for as the Court requires him who calls for its extraordinary interposition, and upon whom the onus lies, to remove any doubts it may have, before it will accede to the application, (*x*) so it is not incumbent on those who [294] shew cause against a rule for a mandamus *to prove that the proceedings have been strictly regular, or that the prosecutor is not entitled, therefore the Court will not grant the writ if the applicant do not shew by his own statement of the case, that an injustice has been done to

(*p*) *R. v. Surrey (J.)*, 2 Show. 71. *R. v. Carter*, 4 T. R. 246.

(*q*) *Ante*, p. 193 n. (*r*). *R. v. London (Ep.)*, 1 T. R. 333. *R. v. Fowey (Mayor)*, 4 D. & R. 137.† *S. C.* 2 B. & C. 59.† *S. C.* 5 D. & R. 614.†

(*r*) *R. v. Blackwall Railway*, 9 D. 558.

(*s*) *R. v. Portsmouth (Mayor)*, 3 B. & C. 157.† *S. C.* 4 D. & R. 767.†

(*t*) See *ante*, p. 56, n. (*u*), 87, n. (*k*), 212, n. (*z*), (*a*). *Anon.*, 2 Barn. 437. *R. v. Litchfield (Ep.)*, 2 Barn. 365. See tit. "Manor" (Admission).

As to the necessary quality of the prosecutor's right, see *ante*, p. 27, 28.

(*u*) *Vintners' Company's case*, Bull. N. P. 200. But see *R. v. Nottingham (Mayor)*, Say. 36; Bull. N. P. 204, as to form of allegation in writ. *R. v. Devizes*, Bull. N. P. 195, 204.

(*v*) 3 Bac. Abr. tit. "Man." (A). And see *R. v. Wheeler*, Cas. t. Hard. 99. *Case of Vintners' Company*, Bull. N. P. 196, 200.

(*w*) *R. v. Canterbury (Archbp.)*, 7 Mod. 220.

(*x*) *R. v. Customs (Collector of London)*, 1 M. & S. 256. See *infra*, n. (*z*).

him.(y) Thus when the application is made in respect of an office not known to the law, the nature of the office and duties of the officer, should be specially shewn upon the affidavits, otherwise the Court will dismiss the application.(z)

The applicant must also shew by his affidavits, that he has complied with all the requisites, preliminary, and necessary, to the obtaining of the writ.(u) Thus where the minister of an endowed dissenting meeting-house had been expelled by a majority of the congregation, the Court refused a mandamus to restore him, applied for in order to enable him to justify his conduct, because it did not appear he had complied with all the requisites necessary to give him a *prima facie* title.(b)

The applicant must also, by his affidavits, shew the Court's jurisdiction over the subject-matter of the application ;(c) that he has no specific legal remedy,(d) and that there has been, if necessary, a demand and refusal, previously to the making of the application.(e)

—.] *Renewing*.—Where an application for a mandamus has failed, the Court has the power of allowing such application to be renewed,(f) as upon amended affidavits stating a demand and refusal,(g) or where *after inspection, &c., or because the mandamus is defective, it is [*295] desirable to commence the proceedings *de novo*.(h) But in a case where a second application has been made, without reference to former proceedings, and a second rule nisi obtained on fresh affidavits, the Court notwithstanding the merits of the case had been discussed on the previous motion, refused to hear it.(i)

(y) *R. v. London (Mayor)*, 2 T. R. 180. See ante, p. 292, n. (l).

(z) Ante p. 186, n. (f). See tit. "Ashburton" (Eight Men of).

(u) Ante, p. 27, 28. *R. v. West Looe (Mayor)*, 5 D. & R. 590.† S. C. 3 B. & C. 677.† *R. v. London Railway*, 15 L. J., N. S. 42, Q. B. *R. v. Radnorsh. (J.)* 15 L. J., N. S. 151, M. C. See tit. "Office" (Restoration, Application.)

(b) See ante, p. 27, 28. *R. v. Jotham*, 3 T. R. 575. *R. v. Barker*, Burr. 1265. S. C. 1 W. Blac. 300, 352. S. C. Andr. 24. See tit. "Office" (Restoration, Application.)

(c) Ante, p. 10—12. See post, tits. "Affidavits," "Writ" (Averments).

(d) See ante, p. 18—27. *R. v. Clear*, 4 B. & C. 899. 901.† S. C. 7 D. & R. 393. *R. v. Clapham*, 1 Wils. 305. *R. v. Westowe, (Mayor)* 5 A. & E. 788.† S. C. 1 N. & P. 222.† *R. v. Stoke Damerel (Minister)*, 1 N. & P. 59.† S. C. 5 A. & E. 584.† *R. v. St. Katherine's Dock*, 4 B. & Ad. 362.† S. C. 1 N. & M. 121.† *R. v. Canterbury (Archbp.)*, 8 East, 213. *R. v. Bristowe*, 6 T. R. 168, 169. *R. v. England (Bank)*, 2 Doug. 524. *R. v. Nottingham Water Works*, 6 A. & E. 372.† S. C. 1 N. & P. 481.† *R. v. Wyndham, Cowp.* 378.

(e) See ante, p. 282, n. (a), 285 n. (l), 287, n. (y), and post, tit. "Writ."

(f) *R. v. West Riding (J.)*, 12 East 117. *R. v. Deptford Pier*, 8 A. & E. 917.† *R. v. St. Pancras*, 3 A. & E. 544.† S. C. 5 N. & M. 222.† *R. v. East Lancash. Railway*, 16 L. J., N. S. 125, Q. B.

As to renewing an application for an ordinary rule, see Chit. Prac. 1426.

(g) Ante, p. 282. *Ex parte Carlton High Dale (Inhabs.)*, 4 N. & M. 313.† But see *Ex parte Thompson*, 6 Q. B. 721.† S. C. 14 L. J., N. S. 176, Q. B. contra. *R. v. Deptford Pier*, 8 A. & E. 910, 918.† S. C. 1 P. & D. 128. See post, tit. "Writ" (Averment). As to demand and refusal, see p. 282—287.

(h) *R. v. Nottingham*, 1 W. Blac. 58. *London (City) v. Swallow*, 2 Keb. 76.

(i) *R. v. Pickles*, 3 Q. B. 599.† S. C. 12 L. J., N. S. 40, Q. B. cited in 5 Q. B. 599.† The ruling in *Sherry v. Oke*, 3 D. 349, is questionable. *Levy v. Coyle*, 12 L. J., N. S. 295, Q. B.

The general rule on this subject is, that where the applicant fails from incompleteness in his affidavits, the Court will not grant a writ on fresh affidavits supplying the defect; (*j*) and the only exceptions to the rule which the Court will generally admit, are where the amendment consists merely in correcting an error in the title or jurat of an affidavit, (*k*) which rule applies to public officers as well as individuals. (*l*) The Court will, however, sometimes exercise its discretionary power and enlarge a rule, in order to give the applicant an opportunity to file supplemental affidavits. (*m*) So, in a case where a writ was quashed, on the ground that it was not drawn up in conformity with the rules under which it had issued, and a rule was afterwards obtained for amending the first-mentioned rules, so as to make them agree with the mandamus which was discharged, it was held, that the prosecutor ought to be allowed to make a second application on the same affidavits, for a rule for a mandamus in the terms of the first mandamus, though the object of such application might be the same as that which was sought by the rule for amending the rules. (*n*)

3rd. RULE.] *How obtained; Motion for.*—A rule of the Court for a mandamus can only be obtained on motion, (*o*) and must be made by [*296] counsel in open Court in Term, (*p*) supported by the necessary affidavits, statutes, and documents. (*q*)

—.] *To what Court.*—The motion is usually made in the Bail Court at Westminster, but the Judge there presiding will, in cases of difficulty, direct it to be made in the full Court. (*r*) At the time of the passing of the stat. 9 Ann. c. 20, (*s*) the Court of B. R. at Westminster, the Courts of Sessions of the Counties Palatine, and the Courts of Grand Sessions at Wales, had severally power to issue the writ, and consequently to entertain an application for it. Subsequently, however, by stat. 11 Geo. 4 and 1 Wm. 4, c. 70, the jurisdiction of the Court of Sessions of

(*j*) R. v. Great Western Railway, 1 D. & M. 471. S. C. 5 Q. B., 597.† S. C. 12 L. J., N. S. 129, Q. B. R. v. Manchester Railway, 8 A. & E. 413.† S. C. 3 N. & P. 439, impugning 3 D. 349.

(*k*) 5 Q. B. 597.† S. C. 1 D. & M. 471.

(*l*) Supra, n. (*i*).

(*m*) Doyle v. Douglas, 4 B. & Ad. 554.† See post, p. 301.

(*n*) R. v. East Lancash. Railway, 16 L. J., N. S. 127, Q. B.

(*o*) Ante, p. 5, n. (*k*). R. v. Excise Commissioners, 2 T. R. 385. R. v. Croydon (Churchwardens), 5 T. R. 714. Anon., 2 Barn. 235, 237.

It is often of importance, where the writ is granted by the Court in the first instance, either to proceed to an election upon a vacancy, or to swear and admit churchwardens, or where more than the proper number of persons are elected, on account of adverse claims and disputed rights, to have the writ of mandamus previously drawn, engrossed, and ready for delivery immediately upon the granting of the rule. Gude's Cr. Pr. 182.

As to requesting the Court to insert in the rule the way or manner such rule is to be served, see infra, "Rule" (Service).

(*p*) R. v. Heathcote, 10 Mod. 62, per Parker, C. J. Anon., 2 Barn. 236. R. v. Eye (Mayor), 9 A. & E. 676.†

(*q*) Ante, p. 5, n. (*k*), 292, n. (*k*), (*l*).

(*r*) Ante, p. 5, n. (*k*).

(*s*) See stat. App. As to Ireland, see stat. 19 Geo. 2, c. 12, App.

the County Palatine of Chester, and the Courts of Grand Sessions in Wales, were respectively abolished, and replaced by those of the Superior Courts at Westminster; so that, at this day, the only Courts whereby this writ is granted, are the Court of Queen's Bench at Westminster, and the Courts of the Counties Palatine.^(t) The writ is now very seldom applied for but at Westminster, for a writ there obtained, and signed at the Crown Office, runs into and has effect within the counties palatine.^(u)

At Westminster, the Court of B. R. has the exclusive power of dispensing the prerogative writ of mandamus, and its authority for so doing is, that it is the highest Court in this kingdom for the preservation of the peace, and, therefore, has several exclusive privileges, of which the power of awarding such writ is one.^(v)

The writ of mandamus being of a high prerogative nature, (*breve regium*), no place is privileged from its jurisdiction;^(w) it therefore runs into places which have, for other purposes, a distinct and exclusive jurisdiction, as the precinct of the cathedral church of Norwich,^(x) or a county palatine. Thus where to a writ of mandamus issued at Westminster, the defendants returned that they were a corporation in *the county of [297] Lancaster, which is a county palatine, and then alleged that, therefore, they were not compellable to answer in the Court of B. R.; such last-mentioned Court fined the mayor who made the return 100 marks, and cited the case of the Bishop of Durham, who had been fined 1000 marks for the same cause.^(y) So, the claim of cognizance as to the election of Alderman by the Court of Mayor and Aldermen of London, does not exclude the jurisdiction of the Court of B. R., to issue a mandamus.^(z)

—.] *When granted; Nisi.*—If the right to the writ be clear, especially where the prosecutor is entitled to it *ex debito justitiæ*, the Court will grant a rule nisi, although there may be no precedent of a rule having been granted in *consimili casu*; for where there is a right, law and justice require there should be some remedy;^(a) also as each new case as it arose must have been without precedent,^(b) so the Court will not now allow itself to be fettered in the exercise of its power of dis-

(t) See stat. 6 & 7 Vict. c. 67, App.

(u) See *infra*, n. (y).

(v) *Ante*, p. 9, 10, n. (b); 3 Bi. Com. 110; 3 Steph. Com. 681. *Awdley's case*, 1 Poph. 176. *Hughes v. Hughes*, 1 Keb. 354, per Twysden, J., and *Athow's case* there cited.

The writ in *Middleton's case*, 2 Dyer, 332 b, issued from the Court of B. R., per *Doderidge, J.*, in *Awdley v. Joy*, Poph. 176. S. C. Latch. 123,—notwithstanding the report in 2 Dyer, 332 b, states that it issued from the Court of C. B.

(w) *R. v. Patrick*, 1 Keb. 610.

(x) *Liddleston v. Exeter (Mayor)*, Comb. 422. *R. v. Winchelsea (Corp.)*, 2 Lev. 85. Bac. Abr. tit. "Man." (A.)

(y) —. *Wiggon (Mayor)*, 1 Sid. 92. Com. Dig. tit. "Man." D. 4.

(z) *R. v. London (Mayor)*, 4 M. & R. 36. S. C. 9 B. & C. 21.†

(a) *Ante*, p. 9. *R. v. Cambridge (U.)*, Burr. 1660, per Wilmot, J. *R. v. Pag-ham Sewers*, 8 B. & C. 359.†

(b) *R. v. Ely (Ep.)*, 1 W. Blac. 55. S. C. 1 Wils. 266.

pensing justice, by being told that, in ancient time, such a writ would not have been granted: (c) on the other hand, the Court will in its discretion consider, before the defendant is put to the expense of answering the application, whether or not it will be proper to grant a rule to shew cause. (d)

The Court will not grant a rule in the alternative either for a mandamus or a quo warranto. (e)

The principles of law which govern the dispensation of the writ, have been treated of in Chapter 3, p. 9, to which the reader is referred.

—.] *Absolute in the first instance.* (f)—The Court has the power of granting a rule absolute in the first instance, and will, in general, do so, when such a course will advance the justice of the case, or the facts have reference to annual or municipal offices. Thus, in a case to compel the payment of money for the support of paupers, or to make a poor rate, (g) or to compel the reception by overseers of poor of a deserted [*298] *child, (h) the rule is absolute in the first instance. So is a rule for a mandamus to allow a poor's rate, (i) or to go to the election of a mayor, (j) or of annual municipal officers, especially if the provisions of stat. 6 & 7 Vict. c. 89, s. 5, have been complied with. (k)

The court will also grant a rule absolute in the first instance in all cases where the object of the writ is to admit or swear into an office, provided the right appear plain. (l) Thus, it has been granted in the first instance, for a mandamus to command the archdeacon or other official to swear in a party as churchwarden, chapelwarden, or sidesman, on an affidavit of due election, demand, and refusal, and of notice to the archdeacon, &c. of the application to the Court; the ground of refusal need not however appear by the affidavit in support of the rule. (m) So, as to overseers of the poor, (n) notwithstanding other parties claim to have

(c) *R. v. Fowey* (Mayor), 2 B. & C. 598.† S. C. 4 D. & R. 132.† S. C. 5 D. & R. 614.†

(d) *R. v. London* (Ep.), 13 East, 423.

(e) *R. v. Leeds* (Mayor), 11 A. & E. 512;† 5 Jur. 548.

(f) As to whether a rule is absolute in the first instance, or nisi merely, see the several titles throughout the Alphabetical Series.

(g) Ante. p. 5, 6, 218, n. (r); Bull. N. P. 195. *R. v. St. Andrew's*, 7 A. & E. 281;† and n. (a). *R. v. Edlaston* (Churchwardens), 1 N. & P. 20.† *R. v. Canterbury* (Archbp.), 15 East, 133, 146; 6 T. R. 490. *R. v. Eye* (Mayor), 9 A. & E. 676.† S. C. 2 P. & D. 318. S. C. 8 L. J., N. S. 142, Q. B. See ante, tit. "Poor" (Relief Rate.)

(h) *Ex parte Foundling Hospital*, 5 D. 722. See tit. "Poor" (Relief, &c.)

(i) *R. v. Fisher*, Say. 160.

(j) *R. v. Heydon*, Say. 208, which is the first case where it was so granted.

(k) See stat. App., and ante, p. 56, n. (p). See tit. "Corporation Municipal."

(l) Anon., Chit. 254; Bull. N. P. 199 b. See tit. "Churchwardens" (Swearing in, Rule), "Office" (Admission, Rule.)

(m) *Ex parte Winfield*, 3 A. & E. 614.† *R. v. Litchfield* (Archdeacon), 5 N. & M. 42.† S. C. 1 H. & W. 463. *Ex parte Penruddock*, 1 H. & W. 347.

(n) *R. v. Manchester*, 7 D. 707.

been elected.(*o*) But where the writ is to "*restore*," the practice is, first to grant a rule to shew cause.(*p*)

In other cases, it is also the practice of the Court to grant the rule absolute in the first instance, as where the rule is for a writ to enforce the granting of probate,(*q*) or to admit the freedom of a municipal corporation,(*r*) or to allow an inhabitant of a parish to inspect parish books,(*s*) or a copyholder to inspect the manorial rolls.(*t*) Formerly, the writ issued in the first instance in all cases where its object was to enforce obedience to acts of Parliament, charters, or letters-patent;(*u*) but at this day some specific ground, as urgency, &c., must be shewn, in order to prevent the rule being nisi, because it gives an opportunity to answer the application, and may prevent unnecessary costs.(*c*)

—.] *How obtained*.—The rule, whether absolute in the first instance, or merely nisi, is drawn up by the Master in the Crown Office.(*w*)

*—.] *Form of Rule*.—The Court will, in difficult or doubtful cases, and in cases within stat. 1 Wm. 4, c. 21, suggest the [*299] form of the rule,(*c*) in which case the rule should follow the suggestion.

Any number of persons may be included in one rule and writ, if they are bound to execute it, or if they, in their official capacity, form but one corporation, as churchwardens and sidesmen.(*y*)

A single rule for several writs of mandamus is irregular; so, a rule to shew cause why "one or more" writs of mandamus should not issue, is an improper form of rule.(*z*)

The rule must be properly directed, or the Court may refuse to make it absolute.(*a*) It need not, however, specify the name of the defendant, if an officer, it is sufficient if he be designated by his official appellation;(*b*)

(*o*) *Ex parte Duffield*, 3 A. & E. 617.†

(*p*) Bull. N. P. 199. See *Mayor of Truro*, 2 Chit. 257.† *Ilchester's case*, Id. n. (*a*). *R. v. Coventry (Mayor)*, 3 Doug. 236. See tit. "Office" (Restoration, Rule).

(*q*) *Justice v. Jones*, 1 Barn. 280. S. C. nom. *R. v. Battersworth*. See tit. "Will."

(*r*) *R. v. Coventry (Mayor)*, 3 Doug. 236. See tit. "Freedom."

(*s*) *Anon.*, 2 Chit. 290.† But see *R. v. Arnold*, 4 A. & E. 657.† See tit. "Parish Books" (Rolls, Inspection).

(*t*) 1 R. G., II., 2 Wm. 4, s. 102. See tit. "Manor" (Inspection).

(*u*) *Gude's Cr. Pr.* 180.

(*v*) *R. v. Arnold*, 4 A. & E. 659.†

(*w*) *Imp on Mandamus*, 115.

(*x*) *R. v. Bedford (Corp.)*, 1 East, 80. *R. v. Bridgewater (Corp.)*, 3 Doug. 382.† *R. v. Canterbury (Archbp.)*, 15 East, 121. *R. v. Newsham, Say*, 211. *R. v. Buller*, 8 East, 392. See stats. 1 Wm. 4, c. 21, and 9 & 10 Vict. c. 113, as to Ireland, in App.

The general requisites of the rule are the same as those of ordinary rules of Court; see *Chit. Prac.* p. 1410.

(*y*) See ante, p. 290, n. (*g*), (*r*), (*s*). *R. v. Middlesex (Archdeacon)*, 3 A. & E. 615.† S. C. 5 N. & M. 494.†

(*z*) *R. v. Bridgenorth (Mayor)*, 2 P. & D. 317. S. C. 10 A. & E. 70;† 3 Jur. 384. *R. v. Chester (Mayor)*, 3 Salk. 230.

(*a*) *R. v. Ely (Ep.)*, 2 T. R. 327. *R. v. Ipswich (Bailliffs)*, 2 Salk. 434, 16.

As to how the writ should be directed, see post, tit. "Writ" (Direction).

(*b*) *R. v. Carmarthen (Corp.)*, 4 Jur. 365. And see Bull. N. P. 193, 200.

which latter is the preferable course, as it obviates any inconvenience that may arise from the personal change of such office.(*c*)

The body of the rule should be expressed in definite terms, or the mandamus which must follow the rule may be void for generality or otherwise, and, therefore, be liable to be superseded.(*d*) It is, however, sufficient if the rule state the object of the writ, it need not specify the whole mandamus.(*e*) When the writ is to command an election to an office, the subsisting officer, or officer de facto (if any), must be made a party to the rule;(f) because, he being materially interested in the event of the question, should have an opportunity of protecting himself.(*g*) So, where the effect of the writ is to deprive or oust a party in possession, such party should be a party to the rule and writ.(*h*)

*Five days is sufficient time to be given by the rule, wherein [*300] the defendant is to shew cause against it, and the Court will not, as a matter of course, grant further time;(i) but in a case of difficulty, or where there are several old books, charters, &c. to be inspected, it will enlarge the time for shewing cause.(*j*) So on the other hand, the Court will, in cases of *urgency*, mention a short day, as the "*next day*," upon which cause must be shewn.(*k*) But whatever the time may be, it must be correctly inserted in the rule.

It is well in cases of anticipated difficult service, that counsel should, when moving for the rule, ask the Court to say what service of the rule it will deem sufficient, and to let it form part of the rule, as "that notice of the rule be given to the county justices, or some of them."(*l*)

In some cases,(*m*) the Court will also, where the justice of the case requires it, or it is convenient that all third parties should be before the Court, order that notice of the rule shall be given to such third parties, as to the solicitor of the Treasury, mayor, town clerk, &c., and that such direction shall form part of the rule.(*n*)

—.] *Service of*.—If the rule contain directions as to service, they

(*c*) See post, tit. "Writ" (Direction).

(*d*) *R. v. Liverpool (Borough)*, 1 Barn. 82. *R. v. Holbeche*, 4 T. R. 779. See the title of a rule against churchwardens, overseers, and inhabitants of a parish; *R. v. St. Saviour's*, 7 A. & E. 948,† n. (*b*). *S. C.* 3 N. & P. 126. *S. C.* 1 N. & P. 496,† See post, tits. "Quashing Writ," "Supersedeas," "Writ."

(*e*) *R. v. Willes*, 7 Mod. 262.

(*f*) Ante, p. 167, n. (*c*). *R. v. Banks*, 1 W. Blac. 445. *S. C.* Burr. 1453.

(*g*) *R. v. Scawen*, Burr. 1453. *R. v. Ricketts*, 3 N. & P. 153. *S. C.* 10 A. & E. 544,† And see 11 Geo. 1, c. 4, s. 3.

(*h*) *R. v. St. John's Coll.*, 4 Mod. 233, 368. *S. C.* Skin. 359, 368, 393, 546. *S. C.* Comb. 237, 279, 282. *S. C.* Holt, 436. *S. C.* 2 Keb. 168.

(*i*) *Canterbury (Archbp.) v. Trinity Coll.*, 1 Barn. 194. See infra, "Enlarging Rule."

(*j*) *R. v. Cambridge (U.)*, 8 Mod. 148. See tit. "Return" (When to be made.)

(*k*) Ante, p. 295, n. (*n*). *Anon.*, 2 Barn. 235.

(*l*) See ante, p. 295, n. (*o*). *R. v. Tucker*, 5 D. & R. 434,† *S. C.* 3 B. & C. 545, 546,† *R. v. Mildenhall Savings' Bank*, 6 A. & E. 952, 954,† *S. C.* 2 N. & P. 278.

(*m*) *R. v. Cambridge (U.)*, 1 W. Blac. 547. *S. C.* Burr. 1647; Say. 211. *R. v. Bankes*, 1 W. Blac. 444. *S. C.* Burr. 1452. *R. v. Simpson*, 1 W. Blac. 457. *S. C.* Burr. 1463. *R. v. St. Peter's*, 4 P. & D. 252. *S. C.* 12 A. & E. 527,†

(*n*) *R. v. Treasury Lords*, 10 A. & E. 375,† *S. C.* 2 P. & D. 498.

must be implicitly followed; if, however, there be no such direction, as a general rule, the rule must be served upon those to whom the writ is to be directed; (o) although it may not be necessary either to serve the copies personally, or to show such original rule at the time of the service, yet it is better in all cases, where practicable, to serve the party himself, and at the same time to produce and shew to him the original rule. (p)

—.] *Notice of.*—If the rule contain a direction that a notice of it shall be given to particular persons, such notice must be strictly given. (q)

—.] *Affidavit of Service, and of Notice.*—Immediately upon service of the rule, or of notice given thereof, an affidavit of such service or notice, should be made, entitled, and sworn in the same way as the *affidavit to obtain the rule nisi, in order that such rule may be [*301] ultimately made absolute. (r)

—.] *Enlarging.*—The Court has the power to enlarge a rule, and will do so, upon terms, if necessary, in order to facilitate the attainment of justice; such an application will be granted on motion, supported by affidavits of the circumstances, either at the instance of the prosecutor; (s) or of the defendant; (t) or by consent. (u)

The specific circumstances which have induced the Court to enlarge a rule, have been to give an opportunity to hear an appeal; (v) or to make a necessary affidavit, &c.; (w) or in order to amend one. (x)

—.] *Shewing Cause; how.*—The attorney for the defendant should, previously to shewing cause against the rule, obtain from the Crown Office, office copies of the rule, and affidavits upon which it is founded; briefs of which should be handed to counsel, together with copies of such other affidavits, verified copies of charters or other documents, as his client's case may admit of or require. (y) The original affidavits should be filed at

(o) Ante, p. 299, n. (a); Bull. N. P. 195. R. v. Clerkenwell (Overseers), 8 Geo. 1, Bull. N. P. 200.

(p) Gude's Cr. Pr. 182. The rule should be served before nine o'clock at night. As to the service of rules in ordinary cases, see Chit. Prac. p. 1415.

(q) Supra, n. (t). (m), (n). And see ante, p. 268, n. (s).

(r) Gude's Cr. Pr. 182.

(s) See ante, p. 294, n. (f). R. v. East India Company, 4 M. & S. 278, 279. R. v. Mirchouse, 2 A. & E. 638.† S. C. 4 N. & M. 394.† R. v. Dolgelly Union, 8 A. & E. 563.† S. C. 3 N. & P. 542. R. v. Bankes, 1 W. Blac. 444. S. C. Burr. 1452. R. v. Simpson, 1 W. Blac. 457. S. C. Burr. 1463. In re Walsall, 1 H. & W. 370. R. v. Birmingham Railway, 2 Rail. Cas. 710. S. C. 2 Q. B. 47.† As to enlarging rules in general, see Chit. Prac. 1419.

(t) R. v. Hungerford Market, 2 B. & Ad. 204,† (a).

(u) R. v. Cambridge (Mayor), Burr. 2068.

(v) Ante, p. 234, n. (m). R. v. East India Company, 4 M. & S. 278, 279.

(w) See ante, p. 295. R. v. Bateman, 1 N. & M. 719.† S. C. 4 B. & Ad. 552.†

(x) See ante, p. 295, n. (j), (k), (l). R. v. Warwicksh. (J.), 5 D. 382.

(y) Ante, p. 293, n. (v). (w); Gude's Cr. Pr. 224. R. v. Rotherham (Inhab.), 12 L. J., N. S. 17, Q. B.

By Sr. Off. Rules, r. 15, App. it is ordered, "That copies of the writ of mandamus, and return and traverse or other pleadings thereupon, and every other proceeding filed on the Crown side of the said Court, shall, when required, be made at the Crown Office, and delivered to the respective parties or other persons requiring the same."

the Crown Office.(z) The counsel for the defendant must shew cause against, on or before the day named therein, or on the expiration of such further time to which it may have been enlarged. If, however, the counsel who was to have supported the rule, be absent on the argument, the Court will give judgment; but if counsel subsequently attend, the Court will, in its discretion, allow him, or not, to argue in support of it.(a)

As to what may be shewn as cause against the rule, it has been held, that after the determination of a point of law, by the Court, upon a [*302] rule nisi for a mandamus, it cannot be again disussed as a special case, &c., until there shall have been a return made to the writ.(b) Also in shewing cause against a rule for a second mandamus, the defendants are precluded from contending that any of the preliminaries necessary to sustain the first mandamus did not exist.(c) Thus where a mandamus to impanel a jury and to assess the damages sustained, had issued in pursuance of a compensation clause in a local act of Parliament, the Court, upon the discussion of a rule nisi for a second mandamus to enforce the the payment of the damages assessed by virtue of the first, would not allow the legality of the first mandamus to be questioned, for in such a case the regularity of all proceedings previously to and at the trial, is to be presumed, no objection having been made at the time of trial.(d)

—.] *Who may shew cause.*—The Court will, in general, allow all these against whom the rule nisi has been granted, or upon whom it has been served, or have had notice of it;(e) or who are legally interested in the question, to shew cause. Thus on a rule nisi for a mandamus to command justices to enter continuances to hear an appeal against a conviction under the turnpike acts; it was held that it was no objection to the counsel appearing to shew cause, that they were instructed by the attorney of the trustees of the road, on which the offence was alleged to have been committed by the applicant, and not by the justice before whom, or the informer by whom the complaint was made, on which the conviction took place, and to whom respectively the rule was addressed.(f)

In all cases within the stat. 1 Wm. 4, c. 21, s. 4, which relates to matters, &c., done in respect of all offices other than those provided for by

(z) See p. 298. n. (w), and post, tit. "Affidavits" (Filing).

(a) *R. v. Hughes*, 3 A. & E. 429.† S. C. 5 N. & M. 94.† As to ordinary rules, See Chit. Prac.

(b) *R. v. Leicester (J.)*, 7 D. & R. 708.† And see 7 D. & R. 370.† S. C. 4 B. & C. 891.† See post, tit. "Special Case."

(c) *R. v. Nottingham Old Waterworks*, 6 A. & E. 355.† S. C. 1 N. & P. 480.† *R. v. Brewers Company*, 4 D. & R. 492.† S. C. 5 M. & R. 149, 153.

(d) 1 N. & P. 480.† S. C. 6 A. & E. 355.† supra. And see 1 N. & M. 121.† S. C. 4 B. & Ad. 399.† where it was objected that the arbitrator had not adjudicated upon one of the matters in difference.

(e) *R. v. Treasurer Lords*, 2 P. & D. 502. n. (a). See stats. 1 Wm. 4, c. 21, s. 6, and 9 & 10 Vict. c. 113 (l.). App., and ante, tit. "Visitor," p. 273, n. (b).

(f) *R. v. Mid Essex (J.)*, 2 D. N. S. 719, notwithstanding *Johnson v. Marriott*, 2 D. 512. S. C. 3 Cr. & M. 183.*

stat. 9 Ann. c. 20, the Court has power to require, that not only those to whom the writ will be directed, but also that all those who have an interest in the subject-matter thereof, shall be heard against the rule to shew cause.(g)

*4th. RULE ABSOLUTE.] *When granted.*—The Court will make the rule absolute for a mandamus, on an affidavit of service [*303] if no cause be shewn against it,(h) notwithstanding the title of the applicant may not appear clear, but even doubtful;(i) because as the rule for the writ is not conclusive, but only requires the doing of a certain act, or to shew cause why it is not done, so the defendant may, if he so choose, raise an argument on the return.(j) The Court is inclined to make the rule absolute, if any right be shewn on the part of the prosecutor to that which he seeks, or the case be one which the Court thinks worthy of examination, in order that it may be further and more fully discussed on the return, or the evidence submitted to a jury; such a course being in all cases taken, without determining whether a peremptory writ will, or not, be ultimately awarded.(k) The Court will thus make the rule absolute, although the affidavits on which the rule nisi is obtained, contain misrepresentation, scandal and also suppress certain facts, if sufficient remain unanswered, to shew a necessity for the writ.(l)

So, in some cases, as to proceed to the election of capital burgesses, the rule absolute is granted as of course, unless some strong and special reason to induce a refusal of it be assigned.(m) So, both a rule absolute for a writ to put the corporate seal to a certificate of the election of a recorder,(n) or to swear in a corporator,(o) are granted as of course.

The general rule upon which the Court acts in making the rule absolute, and granting the writ is, that if the affidavits raise questions of disputed fact, it will grant the writ in order that those questions may be tried; or if there be questions of law which ought to be put into a more solemn train for inquiry, a similar course will be pursued; but if the arguments on both sides disclose that there is no dispute as to the facts, and the Court has no doubt in point of law, it will not make the rule absolute.(p) As

(g) See stat. App. As to Ireland, see stat. 9 & 10 Viet. c. 113, App.

(h) R. v. Tucker, 5 D. & R. 434.† S. C. 3 B. & C. 545, 546.†

(i) R. v. Dr. Bland, Bull. N. P. 200; Sid. 169; 1 Lev. 23; 2 Lev. 14; 2 Show. 71; Carth. 169; 10 Mod. 49; Bac. Abr. tit. "Man." (E.)

(j) Supra, n. (i). R. v. York (Mayor), 4 T. R. 700. See post, tit. "Return."

(k) R. v. Bland, 7 Mod. 356; Bull. N. P. 196. Anon., 2 Barn. 237. R. v. West Loe (Mayor), 3 B. & C. 683.† S. C. 5 D. & R. 590.† S. C. 2 D. & R. 181.†

(l) See tit. "Affidavit," post.

(m) R. v. Grampond (Mayor), 6 T. R. 302. See ante, p. 297, n. (a), (b).

(n) R. v. York (Mayor), 4 T. R. 699, 700. See tit. "Recorder."

(o) 4 T. R. 700, supra, n. (n).

(p) R. v. Payn, 6 A. & E. 404.† S. C. 1 N. & P. 524.† S. C. 1 W. W. & D. 94, 142. S. C. 2 Jur. 47. R. v. Bishop's Stoke, 8 D. 611. R. v. Dr. Bland, 7 Mod. 355, per Lee, C. J. R. v. Heathcote, 10 Mod. 63, per Parker, C. J. S. C. Fort. 290; 10 Mod. 63, 49, 53. R. v. New Coll., 2 Lev. 14. R. v. London (Mayor), 5 B. & Ad. 233, 237,† and see R. v. Ld. Godolphin, 8 A. & E. 344.† S. C. 3 N. & P. 488.†

before stated, wherever there is a fair doubt, *either upon matter [*304] of fact, or matter of law, the Court will make the rule absolute, in order that it may be properly discussed on the return.(q) And even although a strong case of fraud be disclosed,(r) it will direct a return,(s) especially where the prosecutor has no opportunity to right himself by action, &c.(t) So, the Court will not, on motion and affidavits, determine a corporate question of importance, but will direct the writ to issue, that the question may be decided on the return;(u) and the same as to a disputed question of title.(v) So, where the affidavits of the defendant, in shewing cause, are silent as to any point which, if appearing, would answer the application, and when the refusal of the writ might work a great public inconvenience, the Court will make the rule absolute.(w) But the Court will not, merely for the sake of a return,(x) make the rule for the writ absolute; as where the defendant's affidavits clearly and distinctly shew that the writ should not issue.(y)

If the defendant's affidavits shew that the rule should not have been obtained, the Court will discharge it with costs.(z) So, if the prosecutor have been guilty of laches, &c.(a)

If the Court decide against the granting of the writ, on the ground that the application should have been for an information in the nature of a quo warranto, they will sometimes grant a rule for the latter at once, but, in such case, will discharge the rule nisi for the writ of mandamus with costs.(b) Also where a rule nisi for a mandamus has been obtained, and the prosecutor has afterwards obtained a rule for a quo warranto against the de facto officers, the Court will refuse to hear the two rules discussed together, or to discharge the rule for the mandamus as of course; but after discharging the rule for the mandamus *on the [*305] merits, it may make the rule absolute for a quo warranto.(c) Nor will the Court allow such rules to be discussed together, although it formed part of the rule for the quo warranto, that the motion should come

(q) *R. v. West Looe (Mayor)*, 5 D. & R. 599.† S. C. 3 B. & C. 677,† per Best, J. Anon., 2 Barn. 237; Com. Dig. tit. "Man." (A). *R. v. Birmingham (Rector)*, 7 A. & E. 254;† 11 A. & E. 27.† *R. v. Ely (Ep.)*, 1 W. Blac. 57. S. C. 1 Wils. 266; 2 Lev. 14.

(r) *Goubot v. De Crouy*, 1 C. & M. 772.* S. C. 3 Tyr. 906. S. C. 2 D. 86, cited in *R. v. Round*, 5 N. & M. 427,† n. (b). S. C. 4 A. & E. 139.† S. C. 1 H. & W. 546.

(s) *R. v. Jones*, 2 Barn. 249. *R. v. Litchfield (Ep.)*, 2 Barn. 365.

(t) *R. v. Whalley, Stra.* 1139. S. C. 7 Mod. 398; Com. Dig. tit. "Man." D. 6.

(u) *R. v. Everet*, Cas. temp. Hard. 261. See tit. "Corporation" (Municipal.)

(v) *R. v. Frost*, 8 A. & E. 825.† S. C. P. & D. 75. See ante, p. 297, n. (u).

(w) *R. v. Milverton (Manor)*, 3 A. & E. 286.† S. C. 1 H. & W. 282.

(x) *R. v. Suffolk (J.)*, 5 N. & M. 141.† S. C. 3 A. & E. 725.† per Patteson, J.

(y) Ante, p. 297, n. (d). *R. v. London (Mayor)*, 5 B. & Ad. 233, 237,† and see *R. v. Ld. Godolphin*, 8 A. & E. 344.† S. C. 3 N. & P. 488.†

(z) *R. v. Chester (Ep.)*, Com. Dig. tit. "Man." (B).

(a) *R. Luton Roads*, 1 Q. B. 867,† n. (a). Supra, p. 292.

(b) *R. v. Colchester (Mayor)*, 2 T. R. 259. *R. v. Beedle and others*, 3 A. & E. 175.† See post, tit. "Costs."

(c) *R. v. Winchester (Mayor)*, 7 A. & E. 215.† S. C. W. W. & D. 525. S. C. 1 Jur 738. S. C. 2 N. & P. 274; but see 6 East, 369.

on for argument at the same time with the motion for the mandamus.(d)

Sometimes the Court will make the rule absolute, but direct that no writ do issue, without an order from a Judge for that purpose.(e)

—.] *Against whom obtained.*—The rule nisi can be made absolute against those only who are parties to it, and who have had an opportunity to shew cause against it. Thus, where a rule was obtained, calling on churchwardens and overseers to shew cause why a mandamus should not go, directed to them and the *twenty principal inhabitants*, &c., it was held to be bad, for these last should have been parties to the rule; but the Court gave leave to amend, saying that it would be good on new service.(f)

—.] *Form of Rule.*—The Court, on making the rule absolute, will, for the purposes of justice, mould the rule nisi according to the exigencies of each particular case, and to that end will frame the rule absolute accordingly. Its form should be attentively considered, as the writ must follow the rule, and the Court cannot mould the writ on an application for a peremptory mandamus.(g) Thus, the Court will, if necessary, strike out part of the rule nisi,(h) and make the rule absolute in a modified form; as to hear an appeal upon certain specific grounds, as upon the first, second, fifth, and sixth grounds of appeal.(i) So, on an application to compel payment of 500*l.* compensation, assessed by a jury, and of another sum for costs, the Court granted the rule absolute for payment of the 500*l.* only.(j)

*—.] *How obtained.*—As to obtaining the rule, see ante, [*306] p. 295; the practice in the main being the same as that of the rule nisi.

As the rule absolute for a mandamus cannot be drawn up, unless the affidavits used on shewing cause against it are filed, so, if the attorney for the defendant decline to file them, or to allow them to be filed, the Court will, on motion, grant a peremptory rule, that the defendant's attorney

(d) 7 A. & E. 215.† S. C. 2 N. & P. 274. S. C. W. W. & D. 525, supra, n. (c).

(e) Ante, p. 234, n. (m). In re Bromley, 3 D. & R. 310.†

(f) R. v. Clerkenwell (Churchwardens), Bull. N. P. 200.

As to a writ against "Inhabitants," see post, tit. "Writ" (Direction, Inhabitants), p. 317.

(g) R. v. St. Pancras, 3 A. & E. 535, 542.† S. C. 5 N. & M. 222.† R. v. Worcester Canal, 1 M. & R. 534. R. v. Leicester (J.), 4 B. & C. 891.† S. C. 7 D. & R. 379.† R. v. Sandwich (Mayor), 2 G. & D. 28, 35. S. C. 2 Q. B. 895.† R. v. Nottingham Old Water Works, 1 N. & P. 488.† S. C. 6 A. & E. 335.† R. v. Wilts. (J.), 8 D. 719. R. v. Barker, Burr. 1269, where see form of rule. R. v. Carpenter, 6 A. & E. 794, 801.† S. C. 1 N. & P. 775;† and see R. v. Eye (Mayor), 9 A. & E. 675.† S. C. 2 P. & D. 348. S. C. 8 L. J., N. S. 142, Q. B.

(h) R. v. Cumberland (J.), 1 M. & S. 193. R. v. Nottingham Old Water Works, 6 A. & E. 355.† S. C. 1 N. & P. 480.† R. v. Victoria Park, 1 Q. B. 290.† S. C. 4 P. & D. 639.

(i) R. v. Suffolk (J.), 1 B. & A. 640.† See ante, p. 232, n. (b).

(j) R. v. Nottingham Old Waterworks, 6 A. & E. 355.† S. C. 1 N. & P. 480. S. C. W. W. & D. 166; 1 Q. B. 290,† supra, n. (h).

shall produce the affidavits at the Crown Office on a short day, to be named in such rule, in order that they may be filed.(k)

—.] *Costs.*—Where a rule for a mandamus is made absolute, the costs of the application must, pursuant to stat. 1 Wm. 4, c. 21, s. 6, be made the subject of a separate application, and will not be considered by the Court on disposing of the rule; because, when the writ has issued, it may be the return may shew that the defendant has acted justly.(l) It is, however, a general rule, that if the application for the rule, when made against a public officer, be discharged, the Court will, if such application have been made without good foundation, inflict costs upon the applicant; but if the point were new or doubtful, the Court will not, in its discretion, inflict costs. In all other cases, the Court will also exercise its discretion as to costs.(m)

—.] *Amendment of.*—If the rule be not such as the prosecutor is contented with, or be misconceived, he should apply to the Court before he issues the writ for leave to amend it,(n) and the Court will, if necessary to meet the justice of the case, so amend it.(o) Although the Court has, in one case, refused to amend an informal rule after the writ had issued, but left it to be either superseded or quashed,(p) yet subsequent decisions shew, that the Court will now amend it in such a case; or, on a proper application, they will make a rule for the amendment of the rule upon which the writ has issued, notwithstanding the writ may have been quashed for not having been in conformity with such last mentioned rule.(q)

—.] *Compelling Prosecutor to proceed with Rule.*—After the rule absolute for the writ has been obtained by the prosecutor, he should duly [*307] proceed to sue out his writ; if, however, he do not do so, the *defendant should move, under stat. 1 Wm. 4, c. 21, s. 6, or as to Ireland, stat. 9 & 10 Viet. c. 113, for a rule to shew cause why the prosecutor should not pay the costs of opposing the issuing of the writ of mandamus, or proceed in the prosecution thereof. This rule, when obtained, is brought on as an ordinary rule, and the Court will, after having heard it discussed, decide between the parties; if the prosecutor have not been guilty of laches, it will discharge the rule, but if he have, it will either make it absolute unconditionally, or impose terms upon the prosecutor.(r)

(k) R. v. Middlesex (J.), 1 Chit. 368.

(l) R. v. Salop (J.), 6 D. 28. Ex parte Davies, 5 B. & Ad. 1051.† See post, tit. "Costs."

(m) Ante, p. 49, n. (q), and see post, tit. "Costs."

(n) R. v. Water Eaton (Manor), 2 Smith, 54. R. v. Tucker, 5 D. & R. 434.† S. C. 3 B. & C. 545.† R. v. Clerkenwell, Bull. N. P. 200. See post, tit. "Writ," (Amendment).

As to the amendment of rules in general, see Chit. Prac. p. 1427.

(o) R. v. Banks, Burr. 1454. S. C. 1 W. Blac. 445.

(p) R. v. Wiseman, 1 Barn. 405, 406.

(q) R. v. East Lancashire Railway, 16 L. J., N. S. 127, Q. B., and see R. v. Banks, Burr. 1452. S. C. 1 W. Bl. 455; Bull. N. P. 200.

(r) R. v. Dartmouth (Mayor), 2 D., N. S. 980. S. C. 12 L. J., N. S. 83, M. C. See the stats. App.

*CHAPTER THE FIFTH.

[*308]

THE WRIT OF MANDAMUS, ITS FORM, &C., TOGETHER WITH THE
SUBSEQUENT PROCEEDINGS ANTERIOR TO THE RETURN.

HAVING in the preceding chapter treated of the application to the Court, and of the rule absolute for the writ of mandamus, we now proceed, agreeably with the following analysis, to treat of the form of the writ, the manner of issuing the same, &c., and of such other proceedings to the return, exclusive, as are necessary to the due prosecution thereof.

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THE WRIT.] *By whom prepared.*—The writ must be prepared by the attorney of the prosecutor, or (if in person) by the party suing out the same.(a)

As the success of the prosecutor's case is mainly dependent upon the sufficiency of the writ, and as the majority of such writs are founded *upon either intricate facts, or important principles of law, it is [309] advised that they should be drawn by counsel, and, in some instances, settled in consultation.

—.] *Form of Writ.*—The writ of mandamus is in its form no more than a command by the Queen to those to whom it is directed to do their duty, &c., by the performance of a particular act or acts, as to admit to an office, freedom, &c., in favour of the prosecutor ; his legal title to such per-

(a) See Cr. Cff. R. r. 2, App. As to issuing the writ, see *infra*, "How sued out."

formance by those from whom it is required, being stated as inducement to the command or mandatory clause of the writ.(b)

The writ has, in form, been likened to a declaration in a personal action(c) in this, that no precise form of words is necessary, provided it be sufficient both in form and in substance; (d) for two conditions are required for the perfection of the writ, the one, that it be in matter sufficient, the other, that it be deduced and expressed according to the forms of law; so that an absence of either of such conditions will vitiate the writ.(e)

—.] *Form of; Inducement; Averments, &c.*—As all the principles and rules of pleading in civil actions are also applicable to a writ of mandamus, &c.,(f) so the inducement and averments of such a writ are subjected to their governance. Thus, matter of *inducement* or *recital* may be generally alleged; also, incidental matter should not be specially stated;(g) in other words, they do not require so much certainty as the main averments, or the mandatory clause of the writ,(h) which should be expressed with precision and certainty,(i) or the writ may be quashed.(j) Also, as facts, not evidence, should be averred, so the writ must not be argumentative.(k)

Should the writ be defective for either of these causes, the Court will, in [*310] its discretion, either supersede or quash it, and refuse the *peremptory writ: thus, where a writ to amove certain fellows of a college for not having taken the necessary oaths to the state, was so framed that it did not appear but that the fellows therein mentioned might have taken the oaths required, at the Quarter Sessions, a peremptory writ was denied.(l) Also, as a writ which appertains to an office, of which the Judges are not judicially cognizant, should specially state the nature of such office, in order that it may appear to the Court that it is one properly the subject of mandamus,(m) so, if such office be not specifically described, the Court will refuse the writ.

(b) See ante, p. 3, n. (k), 5, n. (j). R. v. Dublin (Dean), Stra. 536. S. C. 8 Mod. 28. S. C. 1 P. Wms. 348. R. v. Kelk, 1 G. & D. 130. S. C. 1 Q. B. 660.†

(c) R. v. Oxford (Ep.), 7 East. 351. A return has also been likened to a declaration, 3 B. & Ad. 278.† S. C. 2 N. & M. 123.† See post, tit. "Return."

(d) 7 East. 351, supra. R. v. Nottingham (Mayor), Say. 37, per Lee, C. J. A mandamus, having the year expressed by figures, is not thereby vitiated. Butler v. Cobbett, 11 Mod. 255. R. v. Carpenter, 6 A. & E. 794.† S. C. 1 N. & P. 775,† and see 6 A. & E. 794.†

(e) Colt v. Coventry (Ep.), Hob. 164. (f) See ante, p. 8, n. (y).

(g) R. v. St. Pancras (Trustees), 3 A. & E. 540.† S. C. 5 N. & M. 222.† where see form. R. v. Win, 2 Keb. 738, 742; Bull. N. P. 200, and cases there cited.

(h) Steph. Pl. 409, 5th edit.

(i) R. v. Bristol Dock, 6 B. & C. 191.† S. C. 9 D. & R. 319.† where see form of averments, &c. See infra, "Mandatory Clause," and post, "Return" (Form).

(j) See post, tit. "Quashing Writ."

(k) R. v. York, 5 T. R. 73. R. v. Hereford (Mayor), 6 Mod. 309. S. C. 2 Saik 701. S. C. Ld. Raym. 560.

(l) R. v. St. John's Coll., 4 Mod. 241, n. (a). S. C. Comb. 282. See tit. "College" (Fellows, Admission).

(m) Anon., 2 Mod. 316; Com. Dig. tit. "Man." 1 Lev. 162. S. C. Raym. 152.

—.] *Substance of Writ.*—The writ, as we have seen, must be sufficient in substance, as to which the primary rule is, that “*it must be framed in strict accordance with its rule absolute*,” or it will be superseded if not returned, but if returned, it will be quashed^(p) with costs. Thus, where the rule was, that a writ of mandamus should go to “*a mayor and aldermen to call a Hall, and do the business of the corporation*,” and the mandamus was drawn up, “*to assemble the corporation, and admit the several persons who had right to their freedom*,” not naming them, the Court, on motion, superseded the writ with costs.^(o)

The writ must not exceed its rule, beyond adding merely incidental requirements, as by materially enlarging the substantial terms thereof, otherwise the Court will quash the writ, notwithstanding they might, on application upon the same affidavits, have granted a writ equally extensive.^(p)

—.] *Direction of Writ.*—The *Direction* is so material a portion of the writ, and, when defective, gives to the defendant a defence so clear and simple, that too much care cannot be bestowed upon it, in order to ensure its accuracy.^(q)

R. v. Dartmouth (Mayor), 3 Salk. 229, 2; 3 Bac. Abr. 530. See tit. “Ashburton” (Eight Men of), and post, tits. “Supersedeas,” “Quashing Writ.”

(n) Ante, p. 305. R. v. Wildman, Stra. 879. S. C. 1 Barn. 405, 406, (although the rule be not drawn up as moved). R. v. Kingston-upon-Hull (Mayor), 8 Mod. 209. R. v. Water Eaton (Manor), 2 Smith. 54; Com. Dig. tit. “Man.” (A.) R. v. St. Pancras, 11 A. & E. 28. R. v. East Lancashire Railway, 16 L. J., N. S. 127, Q. B.

(o) R. v. Kingston-upon-Hull (Mayor). 11 Mod. 382. S. C. 8 Mod. 209. S. C. Stra. 578; Stra. 893. See post, tits. “Quashing Writ,” “Supersedeas.”

(p) R. v. Water Eaton (Manor), 2 Smith, 54. See post, tits. “Quashing Writ,” “Supersedeas.”

(q) See post, tits. “Supersedeas,” “Quashing Writ,” “Return.”

The following is an alphabetical series of the usual *directions* of the writ:

Alderman. To A. B., Esquire, an Alderman of our City of —, one of the Keepers of the Peace, and Justices assigned, &c., Greeting.

Assizes (Nisi Prius). To our Justices assigned to hold the Assizes, Greeting.

—, (*Crown Court*). To our Justices of Oyer and Terminer, and General Gaol Delivery, Greeting.

Berwick-upon-Tweed. To the Mayor and Bailiffs of our Borough of Berwick-upon-Tweed, Greeting, &c., or, To the Mayor and Bailiffs of Berwick-upon-Tweed, &c.

Borough Compter. To the Gaoler or Keeper of our Gaol, called “The Borough Compter,” in and for our Borough of Southwark, or his Deputy there, Greeting, &c.

Borough Corporation. See “*Corporation of Borough*.”

Borough Gaol. To the Gaoler or Keeper of our Gaol or Prison at —, in and for the Borough of —, or his Deputy there, Greeting, &c.

Central Criminal Court. To our Justices of the Central Criminal Court, and to every of them, Greeting, &c.

Cheshire. To the Sheriff of our County of Chester, Greeting. We command you that you do not forbear by reason of any liberty in your Bailiwick, &c.

Cinque Ports. To our Constable of our Castle of Dover, and Lord Warden of the Cinque Ports, or his Lieutenant there, Greeting; or To the Constable of Dover Castle; or To the Constable of the Castle of Dover. Frank v. James, 5 D. 723.

Commissary of York. To the Commissary of the Province of York (7 East, 348 b.)

Commissioners (Poor Law). To the Poor Law Commissioners, Greeting, &c.

[*311-12] *The Court when it grants the rule for the writ will not usually specify *the person, &c., to whom it shall be directed;

Commissioners (Tithe). To the Tithe Commissioners for England and Wales, Greeting, &c.

Coroner. To A. B., Gentleman, one of our Coroners of and for our County of —, Greeting, &c., or when to the whole, To the Coroners of our County of —, —, or of our City of —, Greeting, &c.

Corporation of a Borough. To the Mayor, Aldermen, and Councillors of our Borough of —, in our County of —, Greeting, &c.

County Gaol. To the Sheriff of —, and to the Keeper of our Gaol at —, of and for our said County, or his Deputy there, Greeting, &c.

Dover Gaol. To the Mayor and Jurats of the Town and Port of Dover, and to the Water Bailiff and Keeper of the Gaol of the said Town and Port, or to his Deputy there, Greeting, &c.

Durham. To the Chancellor of our County Palatine of Durham, Greeting.

Elisors. To A. B., and C. D., Elisors, appointed by our Court of —, in this behalf, Greeting.

Giltspur Street Compter. To the Gaoler or Keeper of our Gaol or Prison in Giltspur Street, in our City of London, or his Deputy there, Greeting.

House of Correction (Middlesex). To the Governor of the House of Correction for the County of Middlesex, in Cold-bath Fields, or his Deputy there, Greeting, &c.

Justices of Assize. To our Justices of Oyer and Terminer, in and for our County of —, and to every of them, Greeting, &c.

Justices of the Peace (Generally). To the Keepers of our Peace, and our Justices assigned to hear and determine divers Felonies, Trespasses, and other Misdemeanors committed within our County of —, and to every of them, Greeting.

— (Individually). To A. B., and C. D., Esquires, two of the Keepers of our Peace, and our Justices assigned, &c., Greeting.

Lancaster. To the Chancellor of our County Palatine of Lancaster, Greeting, &c.

Lieutenant of the Tower. To the Lieutenant of the Tower of London, or his Deputy there, Greeting.

Lord Mayor of London. To the Right Honourable J. H., Mayor of our City of London, one of the Keepers of our Peace and our Justices assigned to hear and determine divers Felonies, Trespasses, and other Misdemeanors committed within our City of London, Greeting.

Newgate. To the Keeper of our Gaol of Newgate, or his Deputy there, Greeting.

New Prison, Clerkenwell. To the Gaoler or Keeper of our Gaol, the New Prison at Clerkenwell, in our County of Middlesex, or his Deputy there, Greeting.

Penitentiary. To the Governor of the General Penitentiary at Milbank, in our County of Middlesex, or his Deputy there, Greeting.

Pentonville Prison. To the Governor of our Prison called "The Pentonville Prison," at Pentonville, in our County of Middlesex, or his Deputy there, Greeting.

Queen's Prison. To the Keeper of our Prison called "The Queen's Prison," or his Deputy there, Greeting.

Recorder of a Borough. To A. B., Esquire, Recorder of our Borough of —, in our County of —, our Justice assigned to hear and determine, &c., in our said Borough, Greeting.

Sessions (Borough). To the Recorder of our Borough of —, our Justice assigned to hear and determine, &c., Greeting.

Sessions (County). To the Keepers of our Peace and our Justices assigned to hear and determine divers Felonies, Trespasses, and other Misdemeanors committed within our County of —, Greeting.

Sessions (Petty). To such of the Keepers of our Peace and Justices assigned, &c., as may be in attendance at a Petty Sessions to be held on the — day of —, at —, in our said County, Greeting.

Sheriff (Bristol). To the Sheriff of the City of Bristol, Greeting, &c.

— (Canterbury). To the Sheriff of the City of Canterbury, Greeting, &c.

so that a defective *direction is at the peril of the prosecutor.^(r) [*313] But where an account of the intricate interests of the defendants, as corporate members, or for any other cause, there is great difficulty as to how the writ should be directed, the Court will state to whom it shall be directed.^(s) So in cases under stat. 1 Wm. 4, c. 21, or as to Ireland, 9 & 10 Vict. c. 113, the Court will, in its discretion, state to whom and how the writ shall be directed.^(t)

It is not necessary that the writ should be directed to all those against whom the rule nisi is obtained, for the Court will mould the latter when

— (Carmarthen.) To the Sheriff of the Town and County of Carmarthen, Greeting, &c.

— (Chester). To the Sheriff of the City of Chester, Greeting, &c.

— (Ely). To the Sheriff of Cambridgeshire, Greeting.

— (Exeter). To the Sheriff of the city of Exeter, Greeting, &c.

— (Gloucester). To the Sheriff of the City of Gloucester, Greeting, &c.

— (Haverfordwest). To the Sheriff of the Town and County of Haverfordwest, Greeting, &c.

— (Kingston-upon-Hull). To the Sheriff of the Town and County of Kingston-upon-Hull, Greeting, &c.

— (Lincoln). To the Sheriff of the City of Lincoln, Greeting, &c. [See post, p. 315, n. (i)].

— (Litchfield). To the Sheriff of the City and the County of the same City, Greeting, &c.

— (London). As in London there are two Sheriffs, so the writ should be directed, To the Sheriffs of our City of London, Greeting.

— (Middlesex). Although two individuals act as Sheriff, yet in law they constitute but one Sheriff, and the writ must be directed accordingly, To the Sheriff of Middlesex, Greeting.

— (Newcastle-upon-Tyne). To the Sheriff of the Town and County of Newcastle-upon-Tyne, Greeting.

— (Norwich). To the Sheriff of the City of Norwich, Greeting, &c.

— (Nottingham). To the Sheriff of the Town and County of Nottingham, Greeting, &c.

— (Oxford). To the Sheriff of the County of Oxford, Greeting, &c.

— (Poole). To the Sheriff of the Town and County of Poole, Greeting, &c.

— (Southwark, Borough). To the Sheriff of Surrey, &c., Greeting.

— (Southampton). To the Sheriff of the Town and County of Southampton, Greeting, &c.

— (Worcester). To the Sheriff of the City of Worcester, Greeting, &c.

— (York). To the Sheriff of the City of York, Greeting, &c.

Southwark Borough Court. To the Mayor of our City of London, and the Recorder of the said City, and others the Keepers of our Peace and our Justices assigned to hear and determine divers Felonies, Trespasses, and other Misdemeanors committed within our Borough of Southwark, Greeting, &c.

Tothill-fields Bridewell. To the Governor of the Tothill-fields Bridewell, or his Deputy there, Greeting.

Tower (Lieutenant of). See tit. "*Lieutenant of Tower.*"

Whitecross Street Prison. To the Sheriff of London and Middlesex, and to the Gaoler or Keeper of the Debtors' Prison for London and Middlesex in Whitecross Street, or his Deputy there, Greeting.

(r) *R. v. Wigan* (Corp.), Burr. 782, 798; Stra. 897. *R. v. Plymouth* (Borough), 1 Bar. 81. Com. Dig. tit. "Man." (C.) But see 13 East, 427. *R. v. Rochester* (Dean, &c.), 1 Barn. 40. Anon., 2 Barn. 361. Bac. Abr. tit. "Man." (F.)

As to the direction of writ to elect and to swear in, see 8 Mod. 112, 128. As to cases within stats. 1 Wm. 4, c. 21, s. 4 (E.), and 9 & 10 Vict. c. 113 (I.), see those stats. App.

(s) *R. v. London Requests' Court*, 7 East, 295, infra, n. (t).

(t) See supra, n. (s), and stats. App.

making it absolute, according to the justice of the case.(u) The writ should, however, follow the rule absolute in this respect.(v)

The writ must be directed to all those who are legally bound to execute it,(w) and to them only;(x) although they may not be those [314] *whose wrongful act, &c., as removal from an office, &c. has occasioned the writ. A breach of this rule renders the writ liable to be either superseded or quashed;(y) thus where a writ directed to a mayor, &c., stated that A. and B. had removed the prosecutor from his office of burgess, and by its mandatory clause commanded the mayor, &c., to command A. and B. to restore him; the Court, on motion, quashed it, for the absurdity of it being directed to one person, to command others.(z)

Where the act, the performance of which is commanded by the writ, is *joint*, and one party only refuses, and the other or others are willing; nevertheless the writ must be directed against both or all.(a) Thus where one parish officer applies for a mandamus against his fellow officer, to concur in making a rate, &c., the writ must, according to the acknowledged and accustomed practice, be against and directed to, both; *i. e.* as well against the applicant, as the defaulting officer.(b) So where two only have a concurrent jurisdiction, the writ should, it seems, be directed to both, commanding them, or one of them,(c) &c.

— *Corporate Body.*—The writ, when directed to a corporate body, should accurately state the name of incorporation, and therein pursue the act of Parliament, charter, or other instrument of incorporation, for no words of equivalent import can be substituted.(d) As, however, a body

(u) See ante, p. 305, and see post, Bull. N. P. 200; Gude's Cr. Pr. 191.

(v) See ante, p. 310, n. (n), (o), (p).

(w) Ante, p. 50, n. (r), 158, n. (k), (l). Bac. Abr. tit. "Man." (F.) R. v. Abingdon (Mayor), 2 Salk. 699. S. C. Carth. 501. R. v. Gloucester (Mayor), Holt. 451. per Powell, J. S. C. 1 Roll. 409. S. C. 1 Bulst. 189. Pees v. Leeds (Mayor), Stra. 640. R. v. Cambridge (V. C.), Burr. 1654. R. v. Norwich (Mayor), Stra. 55. R. v. Hereford (Mayor), 2 Salk. 701. 6; Com. Dig. tit. "Man." (C.) Prin's case, 1 Keb. 686. R. v. Patrick, 2 Keb. 67, 68, 164. Estwick v. London (City), Styles, 43. R. v. Oxford (Mayor), 6 A. & E. 351.† S. C. 1 N. & P. 474.† R. v. Holt, 3 Keb. 668, 706, 734. R. v. Plymouth (Borough), 1 Barn. 81. R. v. Wigan (Mayor), Burr. 1643. Ex parte Cirkett, 3 D. 327. R. v. Poole (Mayor), 1 Q. B. 621.† S. C. 1 G. & D. 730. R. v. Smith, 2 M. & S. 594. R. v. St. Paneras (Churchwardens), 6 Jur. 391; Ld. Raym. 1244.

(x) Ante, p. 212, n. (d). R. v. Hereford (Mayor), Salk. 701. R. v. Smith, 2 M. & S. 594; but see R. v. Holford, 2 Barn. 330, 350. Anon., 1 Barn. 402. See ante, p. 29.

(y) R. v. Gloucester, 3 Bulst. 190. Dr. Witherington's case, 1 Keb. 61. R. v. Croydon Parish, 5 T. R. 713. Estwick v. London (City), Sty. 43. 1. R. v. Sharpe, Gilb. 255; 1 W. Blac. 52. S. C. 1 Wils. 266. But see R. v. Colchester (Town), 2 Keb. 188. R. v. Norwich (Mayor), Stra. 55. See post, tits. "Supersedeas," "Quashing Writ."

(z) See ante, p. 16, n. (k). R. v. Derby (Mayor), 2 Salk. 436. See post, tits. "Supersedeas," "Quashing Writ."

(a) See ante, p. 220, n. (e), 221, n. (g). R. v. Pickles, 3 Q. B. 600.†

(b) Anon., 2 Chit. 254.† See tit. "Poor (Rate Making)."

(c) See ante, p. 145, 146, n. (b). R. v. London (Ep.), 13 East, 427.

(d) R. v. Smith, 2 M. & S. 594, 598. Estwick v. London (City), Sty. 43, 32. See

corporate, by prescription, may have several names by reputation, so it follows, that if it be called by one of such names, though not exactly the right or usual one, the writ will be sufficient, if it describe the official conditions of those forming the body corporate, and they must answer the writ.(e) But if the corporate body, whatever its title may be, be misnamed, the writ will be quashed, because as such writ cannot have any effect, so no legal object can be obtained by its prosecution.(f) Thus, if the corporate body be "*mayor, alderman, and *commonalty*," a writ to the *mayor, burgesses, and commonalty*, is bad.(g) So [315] where a writ was directed to the *ballivis, &c., Gippi*, and not *Gipwici*, it was held to be bad.(h) So because a writ was directed "*To the Mayor of the City of Lincoln, in the County of Lincoln*," and not "*in the County of the City of Lincoln*," it was quashed, there being no such person to whom a peremptory mandamus could go.(i) So if the right of election be in the *mayor and aldermen*, and the mandamus be directed to the *mayor, aldermen, and common council*, the Court will grant a supersedeas *quid improridè emanarit*.(j) But if the duty be in the *mayor, aldermen, et al' de communi concilio*, and the writ be directed to the *mayor, aldermen, and common council*, it will be well though the word *al'* be omitted.(k)

The rule that a writ when directed to a corporate body should describe it by its corporate title prevails, notwithstanding a vacancy or vacancies may exist in one or more of its offices, as those of mayor, aldermen, &c., for its name of incorporation is its legal description, so long as it continues to have any corporate existence.(l) Thus if there be no mayor, or one de facto, and not de jure, and although the writ be to command the corporation to proceed to the election of a mayor, yet it must be directed to "*the mayor*," &c.(m)

form in *Carpenter's case*, Raym. 439. Anon., 12 Mod. 232. Dr. Witherington's case, 1 Keb. 61. *R. v. Gloucester (Mayor)*, Holt, 451, per Powell, J.

(e) *Whitacre's case*, 11 Mod. 67. S. C. Ld. Raym. 1233, 1283. S. C. Holt, 443. S. C. 2 Salk. 434. *Finch's case*, 6 Rep. 65, 66; 2 Roll. Abr. 136.

(f) Sir T. Jon. 52. *Case of Abingdon Town*, Carth. 501. S. C. Salk. 700. *R. v. Rippon (Mayor)*, 2 Salk. 433. S. C. Ld. Raym. 563. *R. v. Ipswich (Bailiffs)*, 2 Salk. 434. S. C. Ld. Raym. 1233. S. C. Holt, 443, 444, 445; Com. Dig. tit. "Man." (C.); Bac. Abr. tit. "Man." (B.), (J.)

(g) 2 Salk. 433, supra, n. (f); Com. Dig. tit. "Man." (C.); Bac. Abr. tit. "Man." (F.)

(h) 2 Salk. 434, 435. S. C. Ld. Raym. 1233. S. C. Holt, 443, 444, 445, supra, n. (f); Com. Dig. tit. "Man." (C.); Bac. Abr. tit. "Man." (B.) See infra, tits. "Quashing Writ," "Supersedeas."

(i) See post, p. 314, n. (f). *R. v. Lincoln (Mayor)* 12 Mod. 190. S. C. Carth. 448. S. C. Ld. Raym. 203, and cases there cited. See infra, tit. "Quashing Writ."

(j) *R. v. Norwich (Mayor)*, Str. 55, Holt, cont.; Salk. 701, 3; Salk. 231, 8; Com. Dig. tit. "Man." (C.); but see *R. v. Gloucester (Mayor)*, Holt, 451; Str. 640, n. (1), 3rd edit. See infra, tit. "Supersedeas."

(k) *Pees v. Leeds (Mayor)*, Str. 640; Com. Dig. tit. "Man." (C.); Bac. Abr. tit. "Man." (F.)

(l) See ante, p. 167, n. (b). *R. v. Smith*, 2 M. & S. 598; Bac. Abr. tit. "Man." (B.)

(m) *R. v. Pembroke (Corp.)*, 8 D. 304. *R. v. Bridgewater (Corp.)*, 3 Doug. 379.†

If the duty, as to elect, &c., commanded by the writ, be that of *part* only of a corporate body, the writ may, in such case, be directed either to such part only, by its portion of the corporate name, or to the whole corporate body. (*n*) Thus where to a mandamus to choose a *mayor, [*316] directed to *Jacobo Courteen, majori, ballivis, et omnibus principibus burgensibus burgi de Abingdon*, who, by their constitution, were to choose a mayor out of such persons as should be proposed by the commonalty; it was objected, that the writ was misdirected, because the name of incorporation was "*mayor, bailiffs, and burgesses*;" but the Court, when overruling the objection, said, "that though the writ might have been directed to the whole corporation, yet it could not be necessary, that it should be directed to more than those, or that part of the corporate body which was concerned in the execution of the thing required, for it is not in the power of others to put the command of the writ in execution." (*o*) It is not, therefore, necessary that a writ to a corporate body should, in every case, be directed to the whole corporation (though it may be so), for, as just stated, it is sufficient if it be directed to him or them who alone have the power to execute the writ. (*p*) If, however, the writ be to be executed by a part only of the corporate body, and the direction be not to such body by its corporate name, but in terms extends the description beyond the part legally liable to execute the writ, the Court, on motion, will either supersede or quash it. (*q*) Thus, where a writ commanded "*aldermen and commonalty*" to elect, &c., which direction was not a command to the body by its corporate name, because, by the charter upon which it was founded, *some* of the commonalty were excepted; it was held, that as the command extended beyond the persons who were entitled under the charter to concur in the election, such a direction was bad, and avoided the writ. (*r*) But a writ directed to "*The Mayor and Burgesses*," which commanded them to elect and swear in a

R. v. Bedford (Corp.), 1 East, 79, and R. v. Cambridge (Mayor), Burr. 2011. Tayler v. Gloucester (City), 1 Roll. 409. S. C. 1 Bulst. 189. S. C. 2 Show. 204. S. C. 3 Salk. 230, 8. R. v. Oxford (Mayor), 1 N. & P. 474.† S. C. 6 A. & E. 349.†

(*n*) Patrick's case, 2 Keb. 67; 3 Keb. 706. R. v. Abingdon (Mayor), 2 Salk. 699. S. C. Carth. 501, overruling Holt's case, Jones, 52. R. v. Gloucester (Mayor), Holt, 450, 451, per Powell, J.; 1 Roll. 409. Pees v. Leeds (Mayor), Stra. 640. R. v. Cambridge (V. C.), Burr. 1654. R. v. Norwich (Mayor), Stra. 55. R. v. Hereford (Mayor), 2 Salk. 701, 6. S. C. Ld. Raym. 560. Com. Dig. tit. "Man." (C.) Holt's case, Freem. 441. See Carth. 501; Dyer, 333. Estwick's case, 2 Roll. Abr. 456. R. v. Tregony (Mayor), 8 Mod. 112. S. C. 8 Mod. 128. R. v. Smith, 2 M. & S. 598. Bac. Abr. tit. "Man." (F.)

(*o*) 2 Salk. 699, supra, n. (*n*).

(*p*) Ante, p. 315, n. (*n*), 317. R. v. Gloucester (Mayor), Holt, 450. Harcourt v. Fox, Comb. 213. R. v. Norwich (Mayor), Stra. 55. R. v. Abingdon (Mayor), Ld. Raym. 560. S. C. 2 Salk. 701, 6. R. v. Smith, 2 M. & S. 591. Bac. Abr. tit. "Man." (F.)

(*q*) R. v. Smith, 2 M. & S. 583, 598. R. v. Abingdon, 2 Salk. 701. S. C. Ld. Raym. 560. R. v. Taylor, 3 Salk. 231, 8. R. v. Norwich (Mayor), Stra. 55. Bac. Abr. tit. "Man." (B.), (F.)

(*r*) 2 M. & S. 597, per Ellenborough, C. J., supra. See Case of Abingdon Town, Carth. 501, overruling Holt's case, Jones, 52. Bac. Abr. tit. "Man." (F.) See infra, "Mandatory Clause."

mayor, "secundum auctoritatem vestram," has been held to be good; although the power was to the burgesses to elect, and to the mayor to swear in, for in such a case, the direction must be construed, *reddendo singula singulis*.(s)

*The result of the above cases, therefore, is, that if the writ be directed neither to the corporation, by its corporate name, nor to those who should execute it, by their proper descriptions, it is clearly bad,(t) and liable either to be superseded or quashed. [*317]

The writ must not only be directed to the corporation or select body in its proper name, but also in its official capacity, as expressed in the rule absolute.(u) Thus, in a case where the writ was directed to the two bailiffs of a town to swear in other bailiffs, and they objected "that having sworn in others, and being now no longer bailiffs, and the writ not being directed to them in their natural capacities, they were not obliged to pay any obedience thereto;" the Court however, notwithstanding, obliged them to return the writ, upon the assumption, that if the persons sworn in by them had no right to be chosen, they, the defendants, still continued bailiffs, and ought to obey the writ.(v)

——.] ——. *Officers*.—The writ, when directed to an individual, should be addressed to him by his official name, if the writ have relation to his office, as such a course obviates any inconvenience that may arise from the personal change of such office.(w)

——.] ——. *College*.—In a writ to a college, the fellows ought to be parties.(x) But a mandamus directed to the senior fellow, who alone had power to admit, has been held to be good, without the name of the college.(y)

——.] ——. *Inhabitants of Parish*.—A writ of mandamus may properly be directed to the "*Inhabitants*" of a parish, although not incorporated as such,(z) and those of them upon whom the writ shall be served may be punished for disobedience if they neglect it; for if the Court think that the writ ought to issue, it will find some means whereby

(s) *R. v. Tregony* (Mayor), 8 Mod. 111. S. C. 8 Mod. 127. And see 1 Roll. Abr. 409; 2 Jones, 52, &c.; Com. Dig. tit. "Man." (C.)

(t) 2 M. & S. 594, supra, n. (q).

(u) See ante, p. 313, n. (v). *Papillon's case*, Skin. 64. *R. v. West Looe*, 3 B. & C. 685.† S. C. 5 D. & R. 592.† Bac. Abr. tit. "Man." (F.)

(v) *Clitheroe's case*, 6 Mod. 133. *R. v. Wrexham* (Churchwardens), 15 Vin. Abr. 215, pl. 6. Bac. Abr. tit. "Man." (F.) See infra, n. (w).

(w) *R. v. Cambridge* (U.), 1 W. Blac. 551. S. C. Burr. 1647. *R. v. Cambridge* (Mayor), Burr. 2011, in which case the writ was directed "to the late mayor," without specifying his name. *R. v. Dr. Ward*, 7 East, 346, n. (b). *R. v. Ouze Bank Commissioners*, 3 A. & E. 544.† See form in *Carpenter's case*, Raym. 439, and in *Taverner's case*, Raym. 446.

(x) *R. v. St. John's Coll.*, Skin. 549. S. C. 4 Mod. 233, 368. See tit. "University." As to whom notice of rule should be given, see ante, p. 286, n. (z).

(y) *Patrick's case*, 2 Keb. 67; 3 Keb. 706. See ante, p. 316, n. (o).

(z) *R. v. Wix* (Inhabs.) 2 B. & Ad. 197, 198, 199.† *R. v. St. Saviour's Parish*, 7 A. & E. 938.† S. C. 1 N. & P. 496.† S. C. 3 N. & P. 126, where see a form of return by inhabitants. Ex parte *Le Cren*, 2 D. & L. 571. S. C. 14 L. J., N. S. 34, Q. B. See ante, tit. "Parish."

*to enforce the execution thereof.(a) Thus, a mandamus has [*318] been granted to "*The Churchwardens and Overseers of the Poor of the Parish of St. James, Clerkenwell, and to the principal inhabitants thereof*," to, &c.(b) So in E. T., 1 Geo. 3, a mandamus was granted to "*The Vicar, Churchwardens, and Parishioners of Croydon*," to, &c.(c) But in a subsequent case it has been held, that where a duty is performable by the inhabitants of a parish, a mandamus to enforce the performance thereof is properly directed to "*The Churchwardens*." Thus, if the right to elect a sexton be in the inhabitants of a parish, and a mandamus to hold a meeting for such election to be granted, the writ may be properly directed to the churchwardens, and not to the inhabitants generally.(d)

—.] —. *Parish Officers*.—If one parish officer as a churchwarden, should apply for a mandamus against his fellow officers to concur in an act, as the making a rate, &c., the writ must include the whole of the parish officers, as well the applicant,(e) as the defaulting officers, and consequently be directed to them.

—.] —. *Justices*.—The writ when against justices of the peace, should be directed to all of them who, having jurisdiction, have refused to exercise it.(f)

—.] *How misdirection waived or taken advantage of*.—A misdirection may be waived by the defendant, on his making a return answering the exigency of the writ, either in the wrong name of the writ, or by his right name,(g) notwithstanding the return may be insufficient.(h)

If it be wished to take advantage of a misdirection, the defendant should deny the supposal of the writ, and return "*no such officer*," "*no such corporation*," &c., and thereupon the writ, if it be defective, will be either superceded or quashed, because it cannot be executed.(i) It is for [*319] this cause, that the writ need not aver that those to whom it is directed, are those whose duty it is to execute the writ;(j) for, as before stated, if it be not directed to the proper person, that fact may and

(a) 2 B. & Ad. 203,† supra, n. (z)

(b) 2 B. & Ad. 199,† n. (c), supra, n. (z). And ante, p. 305, n. (f).

(c) 2 B. & Ad. 199,† n. (c), supra, n. (z). And ante, p. 305, n. (f).

(d) R. v. Stoke Damerel, 5 A. & E. 588.† S. C. 1 N. & P. 56.† See a direction to a parish governed by a local act, 11 A. & E. 27,† n. See ante, tits. "Parish," "Sexton," "Vestry."

(e) Ante, p. 314, n. (b). See tit. "Poor" (Rate). Anon., 2 Chit. 254. See tit. "Poor" (Rate).

(f) See p. 234, n. (g), 242, n. (a). Carly v. Hardy, 6 Mod. 139, 164. S. C. Holt, 407; but see R. v. Ellis, 12 L. J., N. S. 20 M. C. See tit. "Quarter Sessions" (Appeal, Application), Petty Sessions, Warrant, Application).

(g) Holt 446, per Keeling, J., in R. v. Mills, 1 Keb. 623.

(h) R. v. Smith, 2 M. & S. 594. R. v. Tregony (Mayor), 8 Mod. 129. R. v. York (Mayor), 5 T. R. 74.

(i) Ante, p. 210, n. (g). Dr. Witherington's case, 1 Keb. 68, and cases there cited. Anon., Godb. 44, pl. 52; and see R. v. Malden; R. v. Ipswich (Bailiffs), 2 Salk. 434. S. C. Ld. Raym. 1233; Bull. N. P. 201; Bac. Abr. tit. "Man." (I.) infra, p. 319, n. (p). See post, tits. "Supersedeas," "Quashing Writ."

(j) R. v. Ward, Stra. 893.

should be returned.(k) The prosecutor is, however estopped from denying that the defendants are a corporation, officers, &c., if he have so described them by the direction of his writ.(l)

If the writ be so misdirected that it cannot be amended, the Court will, on motion, before filing, supersede it *quâ improvidè emanavit*; but after return, the motion must be to quash it,(m) for their cannot be restitution on a mandamus ill directed.(n) The Court will, in its discretion, upon application, grant a new writ.(o) The defendant, as before stated, may by his return traverse the supposal of the writ, and so raise the question of misdirection or not.(p)

—.] *Inducement; Averments, &c.*—Although matter of recital or inducement should not be generally alleged, yet it must be in substance sufficient to warrant the mandatory clause of the writ, otherwise the writ will not shew upon its face the right of the prosecutor to that which he seeks, which is a defect for which the Court will either supersede or quash it.(q)

—.] *Averment of the Jurisdiction of the Court.*—The writ must also contain a statement of all facts, necessary to shew the Court of B. R. that it has jurisdiction over the subject of the writ, and in order to afford the defendant an opportunity of traversing such averment.(r) Thus, where a mandamus was applied for “to swear in one who had been elected to be one of the Eight Men of Ashburton Court,” the Court of B. R. refused the writ; because, as it was not expressly stated what the office was, nor what was the place of the eight men, so the writ did *not shew to the Court that the place was such for which a mandamus [326] was the proper remedy.(s)

If on the face of the writ it be not shown that the Court has jurisdiction, or if it disclose matter which shews that the prosecutor is not entitled to it, the Court will either supersede or quash it, and it has been held, that such defect cannot be supplied by matter appearing in the return; for unless the writ be supported, the return cannot come before the Court.

(k) Ante. p. 318, n. (i); Trem. Ent. 45, 452, 461, 465, 483. R. v. Ward, Str. 892, 897. S. C. Fitzg. 123, 194. S. C. 1 Barn. 252, 294, 381. R. v. Clapham, 1 Ven. 110; and see 7 East, 346 (c); Com. Dig. tit. “Man.” (C.)

(l) R. v. Halse, 1 Keb. 20. R. v. Slythe, 9 D. & R. 229.† See post, tits. “Return,” “Pleas.”

(m) R. v. Norwich (Mayor), Stra. 55, 180. S. C. Salk. 699, 701, 433. R. v. Plymouth (Borough), 1 Barn. 81. R. v. Tregony (Mayor), 8 Mod. 111. *Pr. Witherington’s case*, 1 Keb. 11. See post, tits. “Supersedeas,” “Motion to Quash.”

(n) Holt’s case, Jones, 52. See ante, p. 314, n. (f), 318, n. (i).

(o) Harcourt v. Fox, Comb. 213.

(p) Ante, p. 318, n. (i), (k); Bac. Abr. tit. “Man.” (F.) R. v. Ward, Stra. 893. See Holt, 446. See supra.

(q) Ante, p. 309, n. (g). R. v. St. Paneras, 6 A. & E. 314.† S. C. 1 N. & P. 507.† See post, tits. “Mandatory Clause,” “Supersedeas,” “Quashing Writ.”

(r) Ante, p. 10, 11, n. (i), 30, n. (j), 78, n. (r), 113, n. (g). R. v. Gadsby, 1 N. & P. 573,† citing R. v. Oxford (E.), 7 East, 345. R. v. West Riding (J.). 7 T. R. 467. R. v. Margate Pier, 3 B. & Ad. 220.† See tits. “Ashburton” (Eight Men of), “Curate,” “Guildford” (Approved Men of), “Office” (Known to the Law), “Tiverton” (Twenty-four Men of).

(s) Ante, p. 43, n. (s), 75, n. (c), 174, n. (f), (g), 186, n. (l).

Thus, where a writ of mandamus commanded the delivery up of all papers relating to the office of clerk of the Court of Requests, but did not shew any claim by the defendant to detain them by virtue of any right, it was held that the writ was bad, as it did not shew that the detainer was by other than a private individual, and that the defect could not be supplied by a return, which disclosed that the defendant claimed to detain them as clerk of the same office.(*t*)

The Court of B. R. will not, in order to supply a remedy, exercise a jurisdiction which does not belong to them ;(*u*) and, therefore, will, at any time before the peremptory mandamus shall issue, suffer itself to be informed, and examine whether the writ be so framed as to give them jurisdiction.(*v*)

—.] *Averment of Prosecutor's Title.*—The writ should contain allegations of all such facts, as are necessary to shew that the prosecutor is legally entitled to the relief he prays, otherwise it is liable to be quashed.(*w*) Thus, where a mandamus to command an ordinary to license a curate, merely stated that he had been duly *nominated and appointed* by the inhabitants of a township, to be curate of the church of P., without stating the consent of the rector, or either the existence of any endowment, or of a custom for the inhabitants to make such nomination and appointment, the Court quashed the writ for insufficiency.(*x*)

[*321] *The rules as to the averments of title are as follows. That where the facts stated in the writ are sufficient, if not denied, to entitle the prosecutor to have what he claims, it is no objection that they are stated generally; thus, in the case of a mandamus to swear in one elected a freeman of a corporation, an averment that the prosecutor is duly elected, and ought to be sworn in, is sufficient, though so generally stated; because, if these facts be true, he ought to be sworn in. But where it may be answered that, admitting all the facts stated to be true, yet that the prosecutor is not shewn to be entitled to what he asks, such is a fatal objection to the substance of the writ.(*y*)

Where the law casts a right upon the prosecutor, it is sufficient to state such right generally; but if he claim against common right, he must

(*t*) R. v. Hopkins, 4 P. & D. 550. S. C. 1 Q. B. 161.† In R. v. Round, 4 A. & E. 139.† S. C. 5 N. & M. 427.† the official character of the defendant appeared. See post. tit. "Supersedeas," "Quashing Writ," "Quashing Return."

(*u*) R. v. Leicestersh. (J.), 1 M. & S. 444. R. v. Bettesworth, Stra. 857.

(*v*) R. v. Margate Pier, 3 B. & A. 224.† See tit. "Supersedeas," "Quashing."

(*w*) Ante, p. 27, 28, 113. n. (*g*), 130. n. (*l*), and infra, "Mandatory Clause." R. v. Oxford (Ep.), 7 East, 345, 350. R. v. St. Pancras, 3 A. & E. 539.† S. C. 5 N. & M. 222.† R. v. Oxford (Ep.), 7 East, 600. R. v. West Riding (J.), 7 East, 350. S. C. 3 Smith, 341; 7 T. R. 48, 53. Peat's case, 6 Mod. 310, per Holt, C. J. R. v. Nottingham (J.), 2 Barn. 56. R. v. Eastern Counties Railway, 4 P. & D. 46. S. C. 10 A. & E. 569.† R. v. Margate Pier, 3 B. & A. 220.† R. v. Newbury (Mayor), 1 Q. B. 759.† R. v. Coopers' Company, 7 T. R. 467. See tit. "Advocate of Doctors' Commons," and the several titles of the series, and post, tit. "Quashing Writ."

(*x*) 7 East, 345, 350, supra, n. (*w*). See infra, "Mandatory Clause." And ante, p. 143, 144.

(*y*) 7 East, 350, supra, n. (*w*).

shew how. Therefore, where in a mandamus to an archdeacon to admit and swear to the office of churchwarden, it was held, as the parishioners by whose election the prosecutor claimed could only have a right to elect a churchwarden by custom, that such custom should have been fully stated upon the writ.(z)

Where a statement of title is necessary, the averment of a *prima facie* one is sufficient to induce a return.(a) Thus, where a mandamus to account before auditors, under the Vestry Act, stat. 1 & 2 Wm. 4, c. 60, averred, "that the auditors duly appointed, and acting under and by virtue of an act, &c., in exercise of the powers given to them by the said act," had summoned the said parties to account; it was held, that it was not necessary to state more fully the adoption of the act by the parish, and the due appointment of auditors.(b) So, *debito modo electus* is all the inducement that is stated in a writ to a municipal body, to admit and swear in a corporator.(c) So, where a writ suggested, that the applicant had a right to an admission to an office, upon payment of a reasonable fine, such was held to be a sufficient allegation, without shewing how, or by whom, it was to be assessed.(d)

Where, however, the circumstances of the case are such, that no averment of title is necessary, all mention of it should be [*322] avoided. Thus, a mandamus to restore, should not shew the nature of the right to the office.(e)

—.] *Averment of Defendant's Duty, &c.*—The writ must expressly state the act, &c., or those facts which constitute the *nature of the duty*, &c., required to be performed by the defendant,(f) and an absence of such an averment will render the writ liable to be either superseded or quashed.(g)

The writ must clearly show upon its face, that it is the *defendant's duty* to execute it.(h) But where a writ of mandamus stated the election of a presentee to a vicarage by a majority, and commanded the Master, who had refused to affix the seal to the appointment, to do so, it was held, that an allegation in the writ as to his power to affix the seal, was suffi-

(z) Needham's case, Trem. 469; 7 East, 350, *supra*. Harris's case, Trem. 471. Dunkin's case, Id. 501. Baker v. Baker, Id. 505. R. v. The West Riding (J.), 7 T. R. 50. R. v. Lyme Regis (Mayor), 1 Doug. 80. See tit. "Custom."

(a) 7 East, 351, *supra*, n. (w), per Ellenborough, C. J., Peat's case, 6 Mod. 310. R. v. Slatford, 5 Mod. 318, per Holt, C. J. R. v. Coopers' Company, 7 T. R. 543. R. v. Tappenden, 3 East, 186. R. v. Win, 2 Keb. 738, 742; S. C. nom. R. v. Marches (President), 1 Lev. 306. S. C. 1 Vent. 110. Com. Dig. tit. "Man." C. 2.

(b) R. v. St. Pancras, 3 A. & E. 535.† S. C. 5 N. & M. 222;† 7 East, 345, *supra*, n. (w). Peat's case, 6 Mod. 310; Com. Dig. tit. "Man." C. 3.

(c) 7 East, 345, *supra*, n. (w); Trem. Plac. Cor. 467. R. v. Dublin (Dean), Stra. 536. S. C. 8 Mod. 27.

(d) R. v. Hastings (Mayor), Cas. t. Hard. 862; Steph. on Pl. p. 409; also Chit. on Pl. tit. "Inducement."

(e) R. v. Nottingham (Mayor), Say. 56. See ante, p. 194, n. (r).

(f) Ante, p. 29, and R. v. Ward (Dr.), Stra. 897, and see tit. "Office."

(g) See post, tits. "Supersedeas," "Quashing Writ," p. 335, 336.

(h) R. v. Dr. Ward, Stra. 893. S. C. 1 Barn. 252, 294; Trem. Entr. 452, 453, 454. R. v. Clapham, 1 Vent. 110. S. C. 2 Keb. 738, 742; 7 East, 351, 347, n. (c). R. v. West Riding (J.), 7 T. R. 53.

cient, which stated, that he had the custody of one of the keys of the chest in which it was kept, and had positively refused to affix the seal, and claimed a right to withhold it.(i)

The writ need not particularly set forth by what authority the defendant's duty exists.(j) Thus, a mandamus to a commissary to admit a deputy registrar, which stated *quod minus ritè recusavit*, has been held to be sufficient, though it was objected, that it did not state the defendant's right to admit.(k) So, a mandamus to a dean to grant probate, which averred that the dean, *juxta juris, exigentiam recusavit*, has been holden sufficient, though it was objected, that it did not show the dean's title to grant probate, by an allegation that there were *bona notabilia*.(l)

The writ must with great certainty call the attention of the defendant to his duty, and to the execution of the writ, otherwise it may be quashed for insufficiency in substance.(m) Thus, the Court has quashed a writ of mandamus, which commanded a bishop to license J. R. to be chaplain or curate of the church or chapel of P., upon the bare averment that he had been duly *nominated and appointed by the inhabitants* of the township of P.; no consent of the rector, nor any custom or endowment, which [*323] might render such nomination effectual of *itself, being alleged. Lord Ellenborough, in his judgment, said, "the bishop it required by this writ to do an act which he is alleged to have refused to do, in breach of his duty; the writ therefore should have stated those facts, which constituted his duty."(n)

—.] *Demand and Refusal*.—The writ should shew expressly by the averment of a demand and refusal, or an equivalent, that the prosecutor, before his application to the Court, did all in his power to obtain redress.(o) The Court has, however, during an argument, ordered the writ to be amended, by the insertion of an averment of "demand and refusal," in order that such argument might proceed independently of the objection.(p)

—.] *Averment of absence of a specific legal remedy*.—The writ should shew that it is the appropriate remedy,(q) and it should allege that the prosecutor cannot have redress by the ordinary legal remedies, other-

(i) R. v. Kendall, 4 P. & D. 603. S. C. 1 Q. B. 366.† S. C. 10 L. J., N. S. 137, Q. B.

(j) Bull. N. P. 200.

(k) R. v. Ward (Dr.), Stra. 896.

(l) R. v. Ward (Dr.), Stra. 857. S. C. Fitzg. 123; Bull. N. P. 200.

(m) R. v. Bristol Dock, 9 D. & R. 319.† S. C. 6 B. & C. 181.† per Bayley, J. R. v. Eastern Counties Railway, 10 A. & E. 531.† S. C. 4 P. & D. 48. See *infra*, tit. "Mandatory Clause."

(n) R. v. Oxford (Ep.), 7 East, 345; 3 A. & E. 539.† S. C. 5 N. & M. 222.† *supra*. R. v. Eastern Counties Railway, 10 A. & E. 539.† S. C. 4 P. & D. 48.

(o) R. v. Dr. Ward, 1 Barn. 411. R. v. Doncaster, there cited. R. v. Kendall, 1 Q. B. 366.† S. C. 4 P. & D. 602. See *ante*, "Demand and Refusal," and *post*, tits. "Supersedeas," "Quashing Writ."

(p) R. v. Newbury (Mayor), 1 Q. B. 759.† S. C. 1 G. & D. 388. S. C. 2 Jur. 812. See *post*, tit. "Amendment of Writ."

(q) Anon., 2 Salk. 525. Tawny's case, 2 Salk. 531. S. C. Ld. Raym. 1009. S. C. 6 Mod. 98. And see *post*, tit. "Quashing Writ," p. 346. 3 36

wise it may be quashed for insufficiency; (*v*) for as the fundamental principle as to the dispensation of the writ is, that there exists no specific legal remedy whereby the prosecutor can have redress, so it is clear that the writ should state that most material fact distinctly, in order that the defendant be not improperly deprived of the power of putting such fact in issue. Thus, where a writ of mandamus, which commanded a corporation to pay a poor rate, omitted to state that it had no effects upon which a distress could be levied, such omission was held to be a fatal objection to the writ, and one that might be taken after the filing of the return, or at any time before the issuing of the peremptory mandamus. (*s*)

—.] *The Mandatory Clause.*—Too much care cannot be bestowed upon the proper framing of this portion of the writ, for the prosecutor is rigidly bound by it; the rule upon this point being, that the writ must be enforced in the terms in which it has issued, or not at all. (*t*)

*As to the substance of the clause, the primary rule is, that it ^[*324] must not include more than one case, whether of the same, or of many individuals, for two or more distinct rights cannot be joined in the same mandamus; if, therefore, the distinct rights of two or more persons be so improperly joined, the writ is liable to be either superseded or quashed. (*u*) Thus, where nine persons joined in a writ to be restored to an office, the Court, when quashing it, said, "Several mandamuses ought to have been brought, for, perhaps, they (the prosecutors) were chosen at different times; the election of one is not the election of another, the amotion of one is not the amotion of the other, and moreover it may be for several faults, one for forfeiture, the other for other reasons." (*v*) So, if such mandatory clause should command the admission of *all persons* having a right, it would, for the same reason, be either supersedeable, or liable to be quashed. (*w*) Thus, in a case where the rule absolute for the writ was to command a mayor "to assemble and do the business of the corporation," but the writ commanded the mayor, &c. "to assemble and

(*r*) *R. v. Shepton Mallet (Overseers)*, 5 Mod. 421. *R. v. Hopkins*, 4 P. & D. 550. S. C. 1 Q. B. 161.† *R. v. Round*, 4 A. & E. 139.† S. C. 5 N. & M. 427;† Com. Dig. tit. "Man." C. 3. *R. v. Eastern Counties Railway*, 10 A. & E. 531.† S. C. 4 P. & D. 48. S. C. 1 Rail. Cas. 509. *R. v. England (Bank)*, 2 Doug. 256. S. C. 2 B. & A. 620, 630.†

As to what is a specific legal remedy, see ante, p. 18—27.

(*s*) *R. v. Margate Pier*, 3 B. & A. 220.† S. C. 2 Chit. 256.† See post, tit. "Quashing Writ," p. 336.

(*t*) *R. v. St. Pancras*, 3 A. & E. 542.† S. C. 5 N. & M. 222.† *R. v. Leicester (J.)*, 4 B. & C. 891. S. C. 7 D. & R. 370.† See ante, p. 305, n. (*g*).

As to writs peremptory in the first instance, see post, tit. "Peremptory Writ."
(*u*) *R. v. Kingston-upon-Hull (Mayor)*, 11 Mod. 382. S. C. Stra. 578. S. C. 8 Mod. 209. Anon., 2 Salk. 433, 436. *R. v. Chester (City)*, 5 Mod. 10, 11. S. C. Comb. 307. S. C. Holt. 438. *R. v. Montacute*, 1 W. Blac. 60; Stra. 578, n. *R. v. Andover (Town)*, 12 Mod. 332. S. C. 2 Salk. 433. S. C. Holt, 441, and cases there cited. *Butler v. Rews*, 12 Mod. 349; Com. Dig. tit. "Man." C. 2; Bac. Abr. tit. "Man." (B.) See post, tits. "Supersedeas," "Quashing Writ," p. 335, 336.

(*v*) See ante, p. 101, n. (*w*). *R. v. Chester (City)*, Comb. 307. S. C. Holt, 438. S. C. 5 Mod. 11. *R. v. Physciaus' (Coll.)*, Burr. 2742. See tit. "Councillor" (Restoration, Form of Writ).

(*w*) *R. v. Kingston (Mayor)*, Stra. 578; Com. Dig. tit. "Man." C. 2.

admit *all* persons having a right to their freedom who should appear before them to demand it," such writ was, on motion, superseded, as being complicated, and because every person's right was distinct. (x)

The above rule as to singleness of interest obtains, although the prosecutors may have been successors in the same office, in respect of which the claims arise. (y)

The same writ may, however, command several persons to be admitted to an office, if in the aggregate they form but one officer, as bailiff, sheriff, &c.; but not, as before stated, several persons into several offices of the same kind, as aldermen, common councilmen, &c., for, in the latter cases, each must have a separate writ. (z)

[*325] *The same writ may command several persons to do several acts, if the performance of all such acts be necessary, in order that the ultimate object of the writ may be obtained. Thus, where a Court Leet, by custom, presented to the steward the person whom the commonalty had chosen to be mayor, the Court of B. R. granted a writ to command the steward to hold a Court Leet, and to the burgesses to attend it, and to present him who had been chosen mayor. (a) So, all matters which are incidental or necessary to the primary object of the writ, may be commanded by its mandatory clause. Thus, a writ, the primary object of which is to compel the hearing of an appeal, usually and properly commands the sessions or recorder to enter the appeal, or to enter continuances and hear and determine the merits of the appeal, and also, if the facts of the case warrant it, to take the recognizances of the applicant and his sureties for trying such appeal, and thereupon forthwith to discharge him out of custody, &c. (b)

The writ may command the doing of an act at the instance of one prosecutor, although the performance of such act may have the effect of perfecting the rights of several persons. (c)

The mandatory clause has no peculiar formula; if, therefore, the legal construction of the language, whatever it may be, shews to the Court that the prosecutor is entitled to that which he seeks by the writ, it will be sufficient.

The mandatory clause differs materially in substance as between the cases of judicial, and ministerial acts. Thus, in the former case, it commands generally, and not specifically, as "to give sentence," without saying "what sentence;" in the latter case, however, the terms of the

(x) See ante, p. 93, n. (u); Bac. Abr. tit. "Man." B. R. v. Wildman, Stra. 993. R. v. Kingston (Mayor), Stra. 578. S. C. 8 Mod. 209. S. C. 11 Mod. 382.

(y) Ex parte Scott, 8 D. 328; 4 Jur. 579.

(z) Ante, p. 101, (w). R. v. Ipswich (Bailiffs) 1 Barn. 407. R. v. Bridgewater (Corp.), 3 Doug. 382; Stra. 1180; 8 East, 271. R. v. Twitty, 2 Salk. 434.

(a) Ante, p. 150, n. (x). R. v. Middlehurst (Borough), 1 Wils. 283. R. v. Christchurch (Borough), Bull. N. P. 200. See tit. "Manor" (Leet).

(b) Ante, p. 232, n. (a). R. v. Newcastle (J.), 1 B. & Ad. 933.† R. v. Abingdon, Ld. Raym. 559. S. C. 2 Salk. 699.

(c) R. v. Ld. Montacute, T., 24 Geo. 2; 1 W. Blac. 60. S. C. 1 Wils. 283; Bull. N. P. 196; Bac. Abr. tit. "Man." (B.)

clause are specific, as "to swear in A. B. as churchwarden," and not generally "to swear in a churchwarden."(*d*)

Where the object of the writ is to command the execution of the provisions of an act of Parliament, &c., the language of such act should be adopted.(*e*)

As to the form of mandatory clause in the case of a discretionary power, see title *Discretion*.(*f*)

*If restitution be sought to an office, which is not one of profit, [*326] but of freedom and government merely, as that of alderman, the mandatory clause should not allege it to be a place of profit, for all the precedents of such writs are without any suggestion of pecuniary loss; it is a sufficient ground for the writ, that there has been a loss of "*precedency*" or "*authority*."(*g*)

In all cases of franchise, the writ should command admission, restoration, &c. to the "*privilege, &c.*," and not to the "place and office, &c.;" as to the "privilege" of freeman.(*h*)

The mandatory clause usually does, and properly should, always contain an alternative sentence,(*i*) which was formerly, when the writs were in Latin, expressed thus, "*si ita est*," or "*si vobis constare poterit*," or "*vel causam nobis significes*;" the legal signification of which sentences is, that the mandatory part of the writ is to be obeyed, only if it can legally be commanded.(*j*) The existence of such alternative clause is not necessary to the validity of the writ, it having been first held, that the writ was sufficient without such words, if there were other words, as "*sicut informamur*," which shewed that the writ was not a peremptory one,(*k*), and afterwards that the writ, being a mandatory writ, the person to whom it is directed ought to make a return or obey, although there be no such clause, nor any equivalent expression.(*l*)

The mandatory clause must be supported by, and not exceed in legal value the averments of title, grievance, &c. forming the inducement of the writ.(*m*) Thus, where a writ commanded "aldermen and commonalty" to elect, &c., which direction was not a command to the body by

(*d*) See ante, p. 13, n. (*a*), (*b*), (*c*), 112, n. (*w*), 185, n. (*g*), (*r*), and tits. "Lecture-ship" (License), "Office" (Officers, Judicial, &c.), "Visitor."

(*e*) See tit. "Act of Parliament," and ante, p. 314, n. (*d*).

(*f*) See ante, p. 12—15.

(*g*) See ante, p. 37, n. (*n*), 101, n. (*u*), 191, n. (*a*), 194, n. (*v*). See tit. "Precedence."

(*h*) Supra, n. (*g*), and see tit. "Freeman" (Restoration, Writ).

(*i*) The alternative clause is said to have been first introduced in Bagg's case, 11 Rep. 93. See post, tit. "Peremptory Writ."

(*j*) Ante, p. 6, n. (*n*), 70, n. (*s*). R. v. Heathcote, 10 Mod. 53. Thompson v. Edmonds, T., 4 Jac. B. R.; 2 Roll. Ab. 456, pl. 4; 2 Dyer, 332 (*b*), n. 28).

(*k*) R. v. St. John's Coll., 4 Mod. 233, 236. S. C. Comb. 279, 280. S. C. Holt, 436. S. C. Skin. 359, 386; 4 Mod. 241, n. (*a*); but see London (City) v. Swallow, 2 Keb. 50, 76.

(*l*) R. v. Owen, 5 Mod. 314. S. C. Comb. 239. S. C. Skin. 669. S. C. Holt, 190; Com. Dig. tit. "Man." (C. 3).

(*m*) Ante, p. 320, 322. R. v. St. Pancras, 6 A. & E. 316.† S. C. 1 N. & P. 507.†

its corporate name; also by the charter upon which the writ was founded, *some* of the commonalty were excepted; it was held, that as the mandatory clause extended beyond the persons who were entitled under the charter to concur in the election, so the writ was repugnant, and therefore void.^(u)

The mandatory clause should, like the body of the writ, expressly state [*327] *the duty required of the defendant,^(o) and with great certainty call his attention to it.^(p)

The mandatory clause must not only clearly and accurately express that which it commands the defendant to do, but such command must not exceed, but be in exact conformity with the legal obligation of the defendant, or the Court will, on motion, quash it, for the Court cannot mould the writ as it would the rule. Thus, in a case arising on the Vestry Act, stat. 1 & 2 Wm. 4, c. 60, which enacts, that the auditors shall meet twice at least in each year at the board room of the vestry, and a majority of the said auditors being present at such meetings, shall audit the accounts of such vestry, and the vestry are required "at every such meeting" to produce a true account in writing, &c., and the auditors are to have the same power of examining the accounts of certain other boards, and are to audit them in the same manner. A mandamus issued, calling upon a board to attend with, and produce to the auditors their accounts, *at such time and place*, or at such times and places, as a majority of the auditors might appoint, and then and there give such information as to the accounts as they might be enabled to give, "according to the directions of the act." It was held, that the writ exceeded the authority given by the act of Parliament, and that the generality of the command was not qualified by the words "according to the directions of the said act," as such expression required the defendant to look dehors the writ, in order to ascertain the duty which was required of him.^(q)

(Such accuracy is necessary, notwithstanding the writ may contain a recital properly stating and limiting the right, as its generality cannot be satisfied by obeying a limited requisition stated in a recital, and because the defendant is not bound to refer to any part but the mandatory clause, in order to ascertain what is required of him.^(r)) Therefore, where a mandamus is awarded for purposes partly legal and partly not, as where

(u) Ante, p. 316. R. v. Smith, 2 M. & S. 597. See post, tits. "Supersedeas," "Quashing Writ," p. 335, 336.

(o) Ante, p. 322, 323. R. v. Ward, (Dr.), Stra. 897.

(p) Ante, p. 322, n. (m). R. v. Bristol Dock, 9 D. & R. 309. S. C. 6 B. & C. 181,† per Bayley, J.

(q) R. v. St. Pancras, 3 A. & E. 535.† S. C. 5 N. & M. 222.† R. v. Tucker, 3 B. & C. 547.† S. C. 5 D. & R. 434.† R. v. St. Pancras, 6 A. & E. 316.† S. C. 1 N. & P. 507.† R. v. Eastern Counties Railway, 2 Q. B. 569.† S. C. 2 G. & D. 1; but see R. v. Bristol Dock, 6 B. & C. 181.† S. C. 9 D. & R. 309.† The objection should not be taken advantage of by a return in the nature of a demurrer, but by motion to quash. R. v. Suffolk (J.), 5 N. & M. 144,† per Patteson, J. York Railway v. Milner, 15 L. J., N. S. 379, Q. B. R. v. Stamp Commissioners, 16 L. J., N. S. 75, Q. B.; Bac. Abr. tit. "Man." B. See post, tits. "Supersedeas," "Quashing Writ."

(r) R. v. St. Pancras, 6 A. & E. 316.† S. C. 1 N. & P. 507.†

a writ exceeds an obligation imposed on the *defendant by an act of Parliament, &c., the Court will not in part enforce it by a [*328] peremptory writ limiting its effect, but will quash it; for although the Court will, for the purpose of justice, mould the rule for the writ, yet it cannot mould the writ itself;(s) also, the writ must be executed in the terms in which it has issued, or not at all.(t)

The word "*forthwith*," so frequently used in the mandatory clause, does not mean that the defendant is to perform or do instantly all that is required, but that he is to set about the performance, &c. directly, and do at once all that can be done.(u)

The final sentence of the mandatory clause, exclusive of the teste and date, is, "and how you shall have executed this our writ, make known to us at Westminster, on — the — day of — (Return day), then returning to us this our said writ," which last eight words are those which render necessary the service of the original writ on the defendant, or on one of them if more than one, in order that he may file it.(v)

Having noticed the several material averments and the mandatory clause of the writ, it remains to add, that if any of those averments be omitted, or the writ be repugnant, or stultify itself, or be vitious for any defect apparent upon the face of it, it is said in the language of lawyers to be *felo de se*, for which defect it is liable, if not amenable, to be either superseded or quashed.(w) Thus, a writ has been said to be *felo de se*, which shewed that there was a general visitor, and that the object of the writ was entirely within his jurisdiction;(x) which writ the Court quashed, notwithstanding it commanded the doing of that which the visitor had required, for where there is a visitor, the Court has no power; which rule prevails, whether the King, or a private individual, be the visitor.(y)

—.] *Teste and Return Day*.—Rule 8 of the Crown Office Rules, which abrogates the practice under Rule, M. T., 4 Ann., thus provides for the teste and return of the writ of mandamus, "Every writ of *mandamus shall be tested and made returnable on a day certain [*329] before the Queen at Westminster, and there shall be eight days at least between the teste and return of every such writ of mandamus, where the act required to be done is in London, or within forty miles thereof, and

(s) Ante, p. 16, n. (n). R. v. St. Pancras, 3 A. & E. 535.† S. C. 5 N. & M. 222.† R. v. Eastern Counties Railway, 10 A. & E. 562.† S. C. 4 P. & D. 48. R. v. Thames Commissioners, 5 A. & E. 815.† See post, tit. "Quashing Writ."

(t) Ante, p. 323, n. (t).

(u) R. v. Onze Bank (Commrs.), 3 A. & E. 550,† per Patteson, J. See R. v. Eastern Counties Railway, 10 A. & E. 556.† S. C. 4 P. & D. 48.

(v) See post, tit. "Filing the Writ."

As early as the reign of Hen. 2, it was usual for writs to contain the clause, "Et habeas ibi hoc breve." Glan. Lib. 1, cc. 13, 14, 15, &c.; Lib. 2, c. 2, &c.

(w) See post, tits. "Supersedeas," "Quashing Writ," p. 335, 336.

(x) Dr. Walker's Cas. t. Hard. 218, 219, per Lee, J. See R. v. Sparrow, 7 Mod. 395, per Lee, C. J., and R. v. Newbury (Mayor), 2 G. & D. 109. S. C. 1 Q. B. 751.† S. C. 6 Jur. 821.

(y) Dr. Walker's case, Andr. 178, in marg.; Bac. Abr. tit. "Mau." (B.) See post, tits. "Supersedeas," "Quashing Writ," p. 335, 336.

fourteen days in all other cases.”(z) The practice which obtained previously to the making of the above rule, required that the writ must have been tested in Term; and if not, the Court always, upon motion, either superseded or quashed it,(a) and refused to award an alias, but in general granted a new writ.

The number of days between the teste and return remains unaltered by the above rule;(b) that of M. T., 4 Ann., which regulated the previous practice on this point, though not couched in the same terms as the new rule, yet is expressed in language, the legal effect of which appears to be the same. By a decision upon the rule, M. T., 4 Ann., it has been held, that notwithstanding the words “at least,” the proper time is “one day inclusive and the other exclusive,” so that a writ tested on the 14th might have been returnable on the 28th.(c)

The writ, although it may not be tested of a day prior to that on which it was granted by the Court,(d) yet in practice it is tested on the same day on which the rule absolute for the writ bears date,(e) whether the rule has been made absolute in the Term in which the writ may have issued or not, in other words the writ ought to bear date the same day as the rule absolute, and to date with any other date is a misprison.(f)

The Court will, in its discretion, amend the writ if improperly tested in Vacation notwithstanding a return may have been made.(g)

The Court has and will on a proper case dispense with the above rule and direct the return to be made within a shorter time. But if [*330] *without the special direction of the Court, the mandamus be drawn up so as to allow less time than the rule requires between the teste and the return, the Court will supersede the writ for irregularity, though the rule upon which the writ was granted may have been absolute in the first instance.(h)

——.] *Endorsement.*—The writ, when prepared and settled must be

(z) See Cr. Off. Rul., App.

(a) Bac. Abr. tit. “Man.” (B.) Moneyer’s case, 1 Sid. 304. S. C. nom. R. v. Starling, 2 Keb. 91; Stra. 539. Grey v. Willoughby, Moore, 465, pl. 657. Clampton v. Skipweth, 1 Sid. 308. See Briefe Fitzh. 203; Com. Dig. tit. “Man.” C. 4. See form of teste. R. v. St. Andrew’s (Parish), 7 A. & E. 284.† S. C. W. W. & D. 395; 1 Jur. 706. R. v. Conyers, 15 L. J., N. S. 300, Q. B. And as to form of ancient teste, ante, p. 267, n. (i). See post, tits. “Supersedeas,” “Quashing Writ.”

(b) See R. v. Dover (Mayor), St. 407. Anon., 2 Salk. 434, where see method of computation; Com. Dig. tit. “Man.” C. 4.

(c) Anon., 2 Salk. 434; Stra. 407; Com. Dig. tit. “Man.” C. 4. R. v. St. Andrew’s Parish, 7 A. & E. 281.† See rule 7 A. & E. 283,† n. (b), and 11 Mod. 64, 65, the operation of which rule was not confined to corporations, 7 A. & E. 284.†

(d) Anon., 2 Salk. 434, 15. See R. v. St. Andrew’s (Parish), 7 A. & E. 281.† S. C. W. W. & D. 395.

(e) R. v. Payn, 6 A. & E. 402.† S. C. 1 N. & P. 524.† Anon., 2 Barn. 236.†

(f) R. v. Conyers, 15 L. J., N. S. 300, Q. B. Supra, n. (e)

(g) R. v. Conyers, 15 L. J., N. S. 300, Q. B. See post, tit. “Amendment.”

(h) R. v. St. Andrew’s (Parish), 7 A. & E. 281.† S. C. W. W. & D. 395; 1 Jur. 706. The Court there awarded an alias writ, but it is apprehended that the defective writ should, in accordance with practice, have been quashed. Sterling’s case, 1 Sid. 304. S. C. 2 Keb. 91. Grey v. Willoughby, Moore, 465, pl. 657. See post, tit. “Supersedeas,” &c.

engrossed on parchment by the prosecutor's attorney, or (if in person) by the party suing out the same, and endorsed with the name and address of such attorney or party suing out the same; it is also usual to endorse on it "By rule of Court."

—.] *How sued out.*—The writ, in order to be sued out, must be taken to the Crown Office, together with the rule absolute, and on payment of 5s., the proper officer will sign it, impress it with a stamp there kept for that purpose, and make an entry or minute of the issuing of such writ, together with the name and address of the attorney or party issuing the same, in a book also there kept for that purpose.(i) Thence it must be taken, as in the case of an ordinary Queen's Bench writ of summons, to the Seal Office, to be there sealed.

—.] *How served.*—The writ should be served personally, (if possible), upon him or them to whom it is directed.(j)

The prosecutor's attorney should, if there be several defendants, make so many copies of the writ as may be requisite for service, reserving one copy for himself. If the writ be directed to one person only, the original should be personally served on such person: but should it be directed to several persons, the original should be delivered to him whose duty it is to make the return, and return the writ, as the mayor, &c., and a copy merely served upon the others at the same time showing to them the original.(k) Thus the service of a writ of mandamus upon a municipal corporation should be effected by the delivery of the writ to the mayor, he being the most visible part of the *corporation,(l) and a copy to the other officers at the same time shewing to them the original [*331] writ. The writ itself should, in general, be personally served as above noticed, for it is expressly stated therein that it must be returned to the Court, which cannot be unless the defendant or one of them, if more than one, be so served.(m) If, however, personal services of the writ may not have been effected, there should be personal service of the side bar rule to return the writ, otherwise an attachment cannot be obtained.(n)

Personal service of the writ, though in general necessary, has, in some cases been dispensed with.(o) Thus where a mandamus had been granted

(i) Bac. Abr. tit. "Man." B.; C. Off. Rules, r. 2, App. The hours of attendance at the Crown Office are from 11 a. m. to 3 p. m. during the Vacation, and from 11 a. m. to 5 p. m. in Term time, except between 10th August and 24th October, when the office closes at two o'clock.

(j) R. v. Exeter (Mayor), 12 Mod. 251. See supra, tit. "Direction."

(k) Ante, p. 328, n. (e). R. v. Exeter (Mayor), 12 Mod. 251, and cases there cited; 6 Mod. 152. R. v. Fowey (Mayor), 4 D. & R. 139.† S. C. 2 B. & C. 684;† and see the service in R. v. Cambridge, (Mayor), 4 Q. B. 802.† As to other services see the several titles throughout the Work. Gude's Cr. Pr. 183. And post, tit. "Attachment."

(l) R. v. Chapman, 6 Mod. 152. R. v. Esham (Mayor), 2 Barn. 265.

(m) Gude's Cr. Pr. 183, ante, p. 328, n. (e), and supra, n. (k).

(n) R. v. North Riding (J.), 7 Q. B. 155.† Corner's Crown Prac. 227, 228. R. v. Fowey (Mayor), 5 D. & R. 614.† S. C. 4 D. & R. 132.† S. C. 2 B. & C. 584;† Gude's Cr. Pr. 183. See post, tit. "Return" (When to be made.)

(o) R. v. Fowey (Mayor), 5 D. & R. 614.† S. C. 2 B. & C. 584.† S. C. 4 D. & R. 132.† See supra, n. (j).

for an election under stat. 11 Geo. 1, c. 4, s. 2, and a rule made that public notice should, according to the provisions of that act, be affixed in the market place, which was accordingly done, the Court granted an attachment for disobedience, against a member of the corporation, who had been served with a copy of the rule, notwithstanding neither the original mandamus nor the rule had been shewn to him at the time of such service, for the public notice directed by the act is *prima facie* sufficient. The application for the attachment would, however, have been well answered, if the party could have shewn that he had no notice of the mandamus. (*p*)

—.] *Filing the Writ.*—The original writ, together with the return made thereto, must be filed by the defendant upon whom it has been served, at the Crown Office, according to the exigency of such writ, on or before the day of the return thereof, under pain of an attachment. (*q*) A motion to file the writ is not now necessary, it must also be filed without a rule first granted for that purpose. (*r*)

—.] *Cross or concurrent Writs; What.*—A cross or concurrent writ of mandamus is one which is issued to effect a particular object, a rule or a writ for the same purpose having been previously granted to other parties. (*s*)

—.] *Motion.*—The motion for a rule for a cross or concurrent [*332] writ may be made at any time after the granting of the rule for the first writ. (*t*)

—.] —. *Rule.*—The rule for a cross or concurrent writ, is obtained upon motion to the Court for that purpose, (*u*) it is not granted as of course, but with difficulty, because the granting it tends not only to harass and oppress those to whom it is directed, by incurring the double expense and trouble consequent upon two returns, but in some cases, as of an election, would, if the writ issued, cause a double election; if, however, some special reason appear by affidavit, or there be reasonable cause to suspect that he who has obtained the rule for the first writ, does not really mean to, or will improperly prosecute it, the Court (*v*) will grant a

(*p*) R. v. Edyvean, 3 T. R. 352.

(*q*) Crown Off. Rules, r. 11, App.

(*r*) Crown Off. Rules, r. 14. See post, "Rule to return Writ."

(*s*) R. v. Wigan (Corp.), Burr. 782. R. v. Scarborough (Corp.), Say. 105. R. v. Haslemere (Corp.), Say. 106. R. v. Oxford (Corp.), Cas. t. Hard. 178, citing Borough of Evesham's case probably. S. C. Stra. 949, but not S. P. Com. Dig. tit. "Man." (B.)

(*t*) R. v. Scarborough (Corp.), Say. 105. R. v. Haslemere (Corp.), Say. 106; the application for the cross writ was in each case made two days after the application for the first.

(*u*) See ante, p. 295, n. (*o*).

(*v*) The Court will require specific affidavits of facts, and not mere suggestions of suspicion founded upon mere imagination. R. v. Wigan (Corp.), Burr. 782. S. C. 2 Ld. Ken. 584. Although R. v. Oxford (Borough), B. R. M. 1737, was a case of a concurrent mandamus granted without affidavits, yet Ld. Mansfield, C. J., Burr. 784, said, that both that and Evesham's case, P. 6 Geo. 2, B. R., were disposed of without argument and opposition, whereas R. v. Scarborough (Corp.), and R. v. Haslemere (Corp.), supra, n. (*t*), were debated and fully considered. The

rule to shew cause why a mandamus should not issue. If, however, a party have been sworn in by virtue of a peremptory mandamus, the Court will not grant a rule for another writ, in order to try the legality of his election, but will leave the parties to any other remedy they may have.(*w*)

Although upon the discussion of the rule, any argument tending to shew why such cross or concurrent writ should not issue may be urged, yet usually the single question raised is, whether there exists any reasonable cause to suspect that the party who has obtained the first writ does not really mean to carry it into execution, and upon the Court being satisfied upon this point, it will either make the rule absolute or refuse it. The rule will, in general be discharged if the party who obtained the first rule will undertake *peremptorily* to execute the writ he has applied for.(*x*) So if the application be only *quia timet*, i. e., founded on a mere suggestion, that the first writ may be suppressed, the Court will refuse it, for the Court will not presume that any person *will dare to suppress [**333*] such a writ.(*y*) So if there be merely delay in prosecuting it, the Court will not award a second writ;(z) but in such a case the Court usually orders a day before which the writ must be executed, to be inserted in the former mandamus, and imposes such other terms as are calculated to ensure its due execution.(a) But where in the case of a writ to proceed to an election, it appeared that the time for proceeding to such election had passed, and that the terms imposed upon the prosecutor, when the rule nisi for the cross or concurrent writ was refused had not been complied with, the Court awarded a concurrent writ and said that if previously there had been good ground to suspect delay, it would then have granted the concurrent writ.(b)

As to rule, &c., see ante, p. 295, 303.

——.] *Returns*.—The defendant must make a return to each writ; he must obey both.(c)

——.] *Costs*.—As to the costs or concurrent writs, see post, tit. "*Costs*."

——.] *Alias or Pluries Writ; when granted*.—At common law, if no return, or an insufficient one(*d*) had been made to the first writ, or the writ was, after the filing of the return, when it was too late to amend it, found to be defective, the ordinary practice was to issue an alias, and if

same case (*R. v. Wigan Corp.*), also discloses that the Master of the Crown Office, during the argument, reported to Lord Mansfield, that it was not the practice to grant cross or concurrent writs of mandamus of course or without special reasons. See *R. v. Turner*, 2 Jones, 215. Com. Dig. tit. "Man." (B.) See ante, tit. "Rule" (*Affidavits*), and post, tit. "*Affidavits*."

(*w*) *R. v. Turner*, Sir T. Jon. 215.

(*x*) *R. v. Wigan (Corp.)*, Burr. 784. S. C. 2 Ld. Ken. 584.

(*y*) *R. v. Scarborough (Corp.)*, Say. 105. See supra, n. (*v*).

(*z*) *R. v. Haslemere (Corp.)*, Say. 106. See supra, n. (*v*).

(*a*) Say. 106, see supra, n. (*z*). *R. v. Plymouth (Borough)*, 1 Barn. 130.

(*b*) Say. 106, supra, n. (*v*).

(*c*) *R. v. Harris*, Burr. 1422. S. C. 1 W. Blac. 430. See post, tit. "Return."

(*d*) *R. v. Corye*, Sty. 87.

necessary, a pluries writ, each returnable immediately.(*c*) In extraordinary cases, however, the Court would, previously to stat. 9 Ann. c. 20, and 1 Wm. 4, c. 21, where justice required it, compel a return to the first or the alias writ,(*f*) and on default, would grant an attachment.(*g*) However, by stat. 9 Ann. c. 20, it was, in the cases of municipal offices, wisely ordained for the purpose of preventing delay, that the return should peremptorily be made to the first writ,(*h*) which statute was, by stat. 1 [*334] Wm. 4, c. 21, extended to writs of *mandamus in all cases, so that an alias mandamus is, at this day, rarely met with in practice, because in cases of difficulty, the Court, on application, will grant further time to make the return.(*i*) In a late case, however, the Court issued an alias mandamus, where the first writ had been superseded, for not having allowed sufficient time between the teste and the return.(*j*)

—.] *Amendment of Writ.*—Formerly, when the doctrine as to amendments remained as at common law, the Court would allow the writ of mandamus to be amended before return filed,(*k*) but not after;(l) notwithstanding the proposed amendment would not have affected the merits of the question;(m) so that if the prosecutor discovered, after the filing of the return, that his writ for any cause required amendment, he was compelled to move for a new one. This practice also prevailed after the passing of the stat. 9 Ann. c. 20, s. 7, although thereby both the stat. 4 Ann. c. 16, and all the Statutes of Jeofayles, were extended to writs of mandamus.(n)

The strict rule of the common law has been, during late years, altogether departed from; the principle as to amendment which now obtains being, that it shall be allowed in all cases where such a course would promote justice.(o) Thus in a late case, the Court ordered the writ to be amended during an argument, in order that such argument might proceed independently of such objection.(p) But if the error in the writ be not

(*e*) Stra. 87, supra, n. (*d*). See form of pluries writ, Trem. Pl. Cor. 452. Bac. Abr. tit. "Man." (H.)

(*f*) R. v. Owen, Skin. 669. Com. Dig. tit. "Man." D. 6. See stats. App. The stat. 1 Wm. 4, c. 21 (E.), is extended to Ireland by stat. 9 & 10 Vict. c. 113.

(*g*) Mayor of Coventry's case, 2 Salk. 429. R. v. Oxford (Mayor), Pal. 455. S. C. Latch. 229. S. C. Noy, 92. Com. Dig. tit. "Man." D. 6.

(*h*) Mayor of Coventry's case, 2 Salk. 429. Anon., 2 Salk. 434. Dr. Witherington's case, 1 Keb. 50. R. v. Raines, 3 Salk. 233; Comb. 238. See Thompson v. Edwards, 2 Roll. Abr. 256, pl. 4. Middleton's case, 2 Dyer, 332 b. Anon., 11 Mod. 265. Dr. Patrick's case, 1 Keb. 294, 298. As to Ireland, see stat. 19 Geo. 2, c. 12, App. See ante, p. 7, n. (*u*), and post, tit. "Return."

(*i*) The stat. 1 Wm. 4, c. 21, was extended to Ireland by stat. 9 & 10 Vict. c. 113. See Stats. App.

(*j*) R. v. St. Andrews (Parish), 7 A. & E. 281.† S. C. W. W. & D. 395.

(*k*) Bac. Abr. tit. "Man." (B.) R. v. Clitheroe (Town), 6 Mod. 133. Com. Dig. tit. "Man." C. 4. See further, as to Amendment, post, tit. "Return" (Amendment).

(*l*) R. v. Stafford (Mayor), 4 T. R. 689. R. v. Clitheroe (Town), 6 Mod. 133, n. (*b*). Bac. Abr. tit. "Man." (B.)

(*m*) 4 T. R. 689, supra, n. (*l*).

(*n*) See stat. App. As to Ireland, see stat. 19 Geo. 2, c. 12, s. 16, App.

(*o*) See post, tit. "Return" (Amendment).

(*p*) R. v. Newbury (Mayor), 1 Q. B. 759.† S. C. 1 G. & D. 388. S. C. 2 Jur. 812; the amendment was the insertion of an allegation of demand and refusal.

one properly the subject of amendment, the Court may be moved that it be either superseded or quashed, *(q)* according to the circumstances of the case.

The application for leave to make the amendments, is usually made by motion to the Court, although there are rare instances of an amendment having been made by Judge's order. *(r)* The rule nisi should specially state the particular amendments which are proposed. *(s)* *If the Court allow the amendments, it will, in its discretion, impose [*335] terms upon the prosecutor. *(t)*

—]. *Supersedeas*.—The Court will, on a proper case made, supersede the writ, that is, restrain all further procedure upon it. The Court is, however, anxious to sustain proceedings, in order to save expense, and therefore will not, on the motion of the defendant, supersede a writ, except for a manifest fault in it. *(u)* Thus, it is no ground for superseding a mandamus to grant administration, that, since the granting of the writ, a suit has been commenced in the Ecclesiastical Court as to such administration. *(v)* If, however, the writ ought not to have been issued, i. e. improvide emanavit, or is clearly irregular, i. e. erroneice emanavit, the Court will supersede it. *(w)* Thus, if there be several distinct rights joined in one writ, it will be superseded. *(x)* So, if the writ do not follow the rule absolute upon which it is founded. *(y)* So, if it be misdirected. *(z)* So, if there be not, agreeably with the rule of Court, the requisite number of days between the teste and return. *(a)* The Court will also supersede the writ, although the case be one in which the Court granted the rule for the writ absolute in the first instance. *(b)*

The Court will not, however, supersede the writ, on affidavits of a fact,

(q) *Horsenail's case*, M., 18 Geo. 3; *Gude's Cr. Pr.* 191. See post, tits. "Quashing Writ," "Supersedeas."

(r) *R. v. Bossiney*, *Gude's Cr. Pr.* 192, 193. See post, tit. "Return" (Amendment).

(s) *R. v. Lyme Regis (Mayor)*, 1 Doug. 135, n. *(f)*.

(t) 1 Doug. 136, supra, n. *(s)*. See post, tit. "Return" (Amendment).

(u) *R. v. Ipswich*, 1 Barn. 407. *Anon.* 5 Mod. 375. *R. v. Beecher*, 8 Mod. 335. See tit. "Amendment," p. 334.

As to quashing writ, see that tit. post, p. 336.

(v) See ante, p. 278, n. *(r)*. *R. v. Bettesworth*, 2 Barn. 420. S. C. 7 Mod. 218. S. C. Andr. 365. S. C. Stra. 857. S. C. 1 Barn. 234, 291, 424. S. C. Fitzg. 125. *Anon.* 5 Mod. 374.

(w) *R. v. Norwich (Mayor)*, Stra. 55. *R. v. Clarke*, 2 East, 78. *Gray v. Tench*, Comb. 454.

(x) *R. v. Hull (Mayor)*, Stra. 578. *R. v. Wildman*, Stra. 893. See ante, p. 324. *R. v. Ipswich (Bailiffs)*, 1 Barn. 407. Bac. Abr. tit. "Man." B. See ante, tit. "Writ" (Mandatory Clause), and post, tit. "Quashing Writ."

(y) See ante, p. 310, n. *(n)*. *R. v. Hull (Mayor)*, Stra. 578. See ante. *R. v. Wildman*, Stra. 879, 880. S. C. 1 Barn. 405, 406. See post, tit. "Quashing Writ," p. 336.

(z) See ante, p. 318. *R. v. Norwich (Mayor)*, Stra. 55, supra. *R. v. Sharpe*, Gilb. 255. *R. v. Ely (Ep.)*, 1 W. Blac. 52. S. C. 1 Wils. 266. See post, tit. "Quashing Writ," p. 336.

(a) See ante, p. 328, 329. *R. v. Dover (Mayor)*, Stra. 407. *R. v. St. Andrews*, 7 A. & E. 281.† S. C. W. W. & D. 395.

(b) Ante, p. 330. *R. v. St. Andrews*, 7 A. & E. 281.† *R. v. Dr. Whaley*, 7 Mod. 309, per Probyn, J. S. C. Stra. 1139.

in those cases in which it requires a return, *(c)* as of the jurisdiction of a visitor, &c.

—.] —. *Motion*.—The rule for a supersedeas is obtained on motion to the Court, *(d)* supported by affidavits, if for extraneous matter, [*336] and not apparent on the face of the writ; *(e)* but if for an objection apparent on the record, the Court does not require an affidavit. *(f)* Notice of motion must be given. *(g)*

The motion to supersede must be made before the return day is out, and not afterwards, which practice was settled temp. Lord Raymond. *(h)* For the practice as to shewing cause, see post, title *Return (Quashing)*, and Crown Office Rules, r. 23, App.

—.] *Rule Absolute*.—If the Court make the rule absolute, it will or not, in its discretion, impose terms. *(i)*

—.] *Quashing Writ*.—As there cannot be a demurrer to the writ, so the Court will, if it should not have been granted, retrieve the error upon motion quia erronee emanavit, *(j)* or quia improvide emanavit; *(k)* but not when the facts stated may, if true, be returned. *(l)*

The grounds upon which the Court will quash the writ are those which shew that the writ should not have issued, or that it is so irregular that it ought not to be further prosecuted, among which are the following, namely, where the writ is not in accordance with the rule. *(m)* Thus, where a mandamus differed from its rule, not merely by adding things incidental to the object of the writ, but by materially enlarging the terms thereof, the Court quashed the writ, notwithstanding it might, upon the same affidavits, have granted a rule as extensive in its terms as the informal writ, if it had been applied for; the Court also refused, on such a motion, to amend the rule, as a rule for that purpose should have been obtained before the writ issued. *(n)* So the Court will quash the writ

(c) Ante, p. 273, 274, n. *(c)*. R. v. Whaley, 7 Mod. 303. S. C. Stra. 1139. R. v. Wallingford (J.), W. Kel. 209. R. v. Tregony (Mayor), 8 Mod. 128. See ante tit. "Visitor."

(d) R. v. Norwich (Mayor), Stra. 55. R. v. Hull (Mayor), Stra. 578.

(e) Stra. 55, supra; 7 A. & E. 282.† But see Sel. N. P. 1037, 11th edit., citing R. v. Dr. Whaley, E. 13 Geo. 2, 34, MS. Serjt. Hill, p. 325, where it is said, the Court will not supersede the writ on an affidavit of the fact, it must appear by matter of record which the party may contest.

(f) Stra. 578, supra, n. *(d)*.

(g) Anon. 1 Wils. 30.

(h) Anon., 2 Barn. 326, per Lee, C. S., in Whitwood v. Joecam, B. R. M. 7 Geo. 2. Bac. Abr. tit. "Man." B.

(i) Ante, p. 335, n. *(t)*. R. v. Norwich (Mayor), Stra. 55.

(j) Ante, p. 335, n. *(w)*. R. v. Heathcote, 10 Mod. 59. R. v. Willingford (J.), 2 Barn. 132. And see Re Long, 14 L. J., N. S. 146, Q. B., in which a peremptory writ which issued in the first instance was quashed. See ante, tit. "Supersedeas," and post, "Return" (Quashing).

(k) R. v. Wix (Inhabs.), 2 B. & Ad. 203.† R. v. Tucker, 3 B. & C. 544, 547. S. C. 5 D. & R. 434.† R. v. St. John's Coll., Skin. 359.

(l) Ante, p. 273, 274, n. *(c)*, 335, n. *(c)*. R. v. York (Mayor), 5 T. R. 73 *(a)*. See tit. "Visitor."

(m) Ante, p. 310. R. v. St. Pancras, 11 A. & E. 27,† n. *(a)*, 28. R. v. East Lancash. Railway, 16 L. J., N. S. 127, Q. B. See ante, tit. "Supersedeas."

(n) Ante, p. 310. R. v. Water Eaton (Manor), 2 Smith, 54. R. v. Tucker, 5 D. & R. 434.† S. C. 3 B. & C. 545.†

where it is misdirected.(o) So where it has the defect of multifariousness, *by reason of joining the claims or rights of several persons.(p) So if the writ be for any cause insufficient, as if it do [*337] not shew upon the face of it that the applicant is entitled to the relief prayed;(q) or where the writ does not state those facts which constitute the breach of duty.(r) So it is the duty of the Court to quash it, where it commands the defendant to do that which by law he has no power to do.(s) So if it command an illegality.(t) So where awarded for purposes partly legal and partly not, as where a mandamus exceeds the obligation, &c. imposed on the defendant by an act of Parliament, &c., the Court will not in part enforce it by a peremptory mandamus limiting its effect, but will quash it, for though the Court will, for the purposes of justice, mould the rule for the writ, yet it cannot mould the writ itself.(u) So the Court will quash the writ if it be not the appropriate remedy.(v) So the Court has quashed a writ for absurdity. Thus a mandamus directed to a mayor, &c., which stated that A. and B. had removed the party complaining from his office of burgess, and commanded by its mandatory clause the mayor, &c., to command A. and B. to restore him, was quashed for the absurdity of being directed to one person to command another.(w) So the writ will be quashed in all cases where it shews that the writ is *felo de se*, as by shewing that there is a visitor who has jurisdiction, &c.(x)

The Court will also quash the writ if it be defective for uncertainty,(y) or if there be not the requisite period of time between the *teste [*338] and the return,(z) but the Court will not quash for these causes after the return day has elapsed.(a)

(o) See ante, p. 319. *Anon.*, 2 Salk. 525, 5. *R. v. Hereford (Mayor)*, 2 Salk. 701, 6. *R. v. Chester (Mayor)*, 3 Salk. 229, 5. *S. P.* 2 Salk. 433. *Bac. Abr. tit. "Man."* B. See ante, tit. "Supersedeas," p. 335, 336.

(p) Ante, p. 324. *The Case of Andover*, 2 Salk. 433, 13. *Anon.*, 2 Salk. 436, 19. *R. v. Chester (Mayor)*, 3 Salk. 229, 5. *S. C.* 5 Mod. 10, 11. *S. C. Comb.* 307, 108. *Hereford's case*, 1 Sid. 209. *White's case*, 6 Mod. 18. *R. v. Hull (Mayor)*, *Stra.* 578. *Bac. Abr. tit. "Man."* (B). See ante, tit. "Supersedeas," p. 335, 336.

(q) See ante, p. 320. *R. v. Oxford (Ep.)*, 7 East, 345, 600. *R. v. West Riding (J.)*, 7 T. R. 52. *R. v. Owen*, 5 Mod. 315. *R. v. St. John's Coll.*, 4 Mod. 241, *notis.* *S. C. Skin.* 549. *S. C. Comb.* 282. *Anon.*, 2 Salk. 525, 5, and cases there cited.

(r) See ante, p. 322. *R. v. St. Pancras*, 3 A. & E. 539.† *S. C.* 5 N. & M. 222.†

(s) See ante, p. 15—17. *R. v. Tucker*, 3 B. & C. 547.† *S. C.* 5 D. & R. 434.†

(t) Ante, p. 15, 16. *Tawney's case*, 2 Salk. 531, 17. *S. C.* 6 Mod. 97. *S. C.* 3 Salk. 232. *R. v. Sparrow*, *Stra.* 1123.

(u) Ante, p. 16, n. (n), 327. *R. v. St. Pancras*, 3 A. & E. 535.† *S. C.* 5 N. & M. 222.† *R. v. Eastern Counties Railway*, 10 A. & E. 562.† *R. v. Thames Commissioners*, 5 A. & E. 815.†

(v) See ante, p. 18—27. *Anon.*, 2 Salk. 525, 5. *Tawney's case*, 2 Salk. 531, 17. *S. C. Ld. Raym.* 1009. *S. C.* 6 Mod. 98. See ante, p. 323.

(w) See ante, p. 16, n. (k), 314. *R. v. Derby (Mayor)*, 2 Salk. 436, 18. See post, *tit. "Supersedeas"* (Quashing).

(x) See ante, p. 328. *R. v. Dr. Walker*, *Cas. t. Hard.* 212. *Bac. Abr. tit. "Man."* B. See ante, *tit. "Visitor."*

(y) Ante, p. 309. *R. v. Willingford (J.)*, 2 Barn. 132. *R. v. St. John's Coll., Comb.* 279.

(z) See ante, p. 329, n. (z). See ante, *tit. "Supersedeas."*

(a) *R. v. Witchurch*, 2 Barn. 447.

As to allowing an amendment on motion to quash, see ante, title Amendment.

—.] *Motion, When made, &c.*—Of the motion to quash notice must be given to the opposite party, or the Court will not entertain it. *(b)*

Formerly, if the writ of mandamus were any way objectionable, an application to quash must have been made before return filed, for after that step taken the objection was considered as waived; *(c)* but this doctrine, at all events, as to matters of substance, is now overruled, *(d)* the Court having in numerous cases permitted such an objection to prevail where a return has been argued; *(e)* and in one case, *(f)* after a return had been held to be bad, exceptions were allowed to be taken to the writ in a subsequent Term. *(g)*. The rule of law which now obtains upon this point is, that where a return is set down for argument on a concilium or demurrer, the defendant may take objections to the writ in matters of substance, *(h)* for on a concilium the *whole record* is set down for argument, and the defendant has a right to object to the writ of mandamus in matters of substance as much as a defendant has a right to object to a declaration where the whole record is set out upon *demurrer or writ of error after plea [*339] in civil proceedings. Also in the case of an indictment to which there has been special pleas, the defendant has a right to object to the indictment, *(i)* for quod initio vitiosum est, non potest tractu temporis convallescere. *(j)*

After a return has been made, and issue thereon tried, the Court will not quash the writ on grounds which were or might have been discussed

(b) See ante, p. 336. Anon., 1 Wils. 30.

As to the practice of quashing the writ, see post, tits. "Quashing the Return," "Demurrer," &c.

(c) R. v. York (Mayor), 5 T. R. 66, 74. But see Bac. Abr. tit. "Man." B., where it is stated, "that the motion to quash cannot be made before return made and filed." Before the filing of the return the practice was, and perhaps is, to supersede the writ. See tit. "Supersedeas," p. 335, 336.

(d) R. v. Newbury (Mayor), 1 G. & D. 388. S. C. 1 Q. B. 751.† R. v. Kendall, 4 P. & D. 619. S. C. 1 Q. B. 366.† See post, tit. "Return" (Quashing).

(e) R. v. Poole (Mayor), 1 G. & D. 732. S. C. 1 Q. B. 616.† R. v. Margate Pier, 3 B. & A. 220.† R. v. Powell, 1 Q. B. 352. S. C. 4 P. & D. 719. S. C. nom. R. v. Richmond (Steward), 5 Jur. 605. Taylor v. Gloucester (City), 1 Roll. 409. R. v. Chester (City), 5 Mod. 10. R. v. Shepton Mallett, 5 Mod. 429. R. v. Abingdon, 2 Salk. 699. S. C. Ld. Raym. 559. S. C. Carth. 499. R. v. Littleport (Parish), 6 Mod. 97. S. C. 2 Salk. 531, 17. R. v. Tregony (Mayor), 8 Mod. 111, 112. R. v. Ward (Dr.), Stra. 893. Moore v. Hastings (Mayor), Cas. t. Hard. 353, 362. R. v. Physicians' Coll., Burr. 1740, 2742. R. v. Bristol Dock, 6 B. & C. 189.† S. C. 9 D. & R. 309.† Bac. Abr. tit. "Man." (B.)

(f) R. v. Abingdon (Mayor), Carth. 499. S. C. 2 Salk. 699. S. C. Ld. Raym. 559. S. C. 12 Mod. 308. S. C. Holt, 441. See post, tit. "Return" (Quashing).

(g) R. v. Margate Pier, 3 B. & A. 222. See post, tit. "Return" (Quashing).

(h) R. v. Powell, 4 P. & D. 719. S. C. 1 Q. B. 360.† R. v. Willingford (J.), 2 Barn. 132. R. v. Bangor (Overseers), 16 L. J., N. S. 58, M. C. See post, tit. "Return" (Demurrer to Return).

(i) R. v. York (Mayor), 5 T. R. 73. See R. v. West Riding (J.), 7 T. R. 52. R. v. St. Pancras, 3 A. & E. 539.† S. C. 5 N. & M. 222.† Clarke v. Leicestersh. Canal, 6 Q. B. 898.† Bac. Abr. tit. "Man." B. R. v. Physicians' (Coll.), Burr. 2740. See further as to invalidating the writ, post, tit. "Return" (Demurrer).

(j) D. 50, t. 17, f. 29.

on shewing cause against the application for it, as that a suggestion on which the motion for the writ was made is untrue. (*k*) So after return made, and issue in fact tried, the Court will not although the writ be materially defective in form, quash it on motion. (*l*)

—.] *Costs*.—When the writ is quashed for a substantial defect, the Court in its discretion will award costs to the defendant. Thus where on a concilium on a return to a writ of mandamus, which commanded the defendants to seal a bond to the prosecutor for the amount of compensation awarded to him by the Lords of the Treasury, under stat. 5 & 6 Wm. 4, c. 76, s. 66, on the abolition of an office, the Court held the writ to be bad, because it appeared on the face of it that the Lords had no jurisdiction, and that as the defendants had disputed not only the amount of compensation, but also the right to any compensation, they ought to have the costs of the writ, and stated that it was so much a matter of cause that costs should attend the event, that such rule ought not to be interfered with unless under special circumstances. (*m*)

*CHAPTER THE SIXTH.

[*340]

OF THE RETURN, ITS FORM, SUBSTANCE, &c., AND OF THOSE FORMULÆ WHEREBY IT, WHEN DEFECTIVE, MAY BE INVALIDATED.

THE subject of this Chapter, the Return, is that formula whereby the defendant answers the prosecutor's writ, and states to the Court of B. R. either that he has performed the command of such writ, or a legal excuse or justification for his non-performance thereof, or that the prosecutor is not entitled to that which he seeks by his writ. (*n*)

RETURN.	RETURN
By whom made - - - 340	Form - - - 348
Persons - - - 340	Substance - - - 349
Corporations - - - 341	2nd. Special in Confession
In cases within 1 Wm. 4, c.	and Avoidance - - 351
21 (E.), and 9 & 10 Vict. c.	Form - - - 351
113 (I.) - - - 342	Substance - - - 358
Application - - - 343	Double or several returns 360
Of returns by several Coporations, Officers, &c. - 343	3rd. Return in the nature of a
When to be made - - - 344	demurrer - - - 362
How enforced - - - 344	Engrossing return - - 363
Rule to return writ - - 344	Signing and sealing - - 363
The return - - - 346	Swearing return - - - 364
When necessary - - - 346	Filing return - - - 365
The species of return - - 347	Necessity of - - - 365
1st. Traverse - - - 348	When to be filed - - 365
	How filed - - - 366

(*h*) R. v. Stamford (Mayor), 6 Q. B. 433.†

(*l*) Ante, p. 309, 310, and see n. (*k*), supra.

(*m*) R. v. Newbury (Mayor), 2 G. & D. 109. S. C. 1 Q. B. 751.† S. C. 1 G. & D. 388. S. C. 2 Jur. 812. S. C. 6 Jur. 821. See generally as to costs, post, tit. "Costs," and ante, tit. "Compensation" (Office, Assessing).

(*n*) A return has been likened to a declaration; 3 B. & Ad. 278;† ante, p. 309, n. (*c*).

RETURN.

Staying filing	-	-	366
Taking off the file	-	-	367
Withdrawing return	-	-	367
Disavowing return	-	-	367
Amendment of return	-	-	368
Invalidating return	-	-	369
Qualifying	-	-	372
Application	-	-	374
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RETURN.

Rule nisi	-	-	374
Shewing cause	-	-	374
Rule absolute	-	-	375
Demurrer to	-	-	375
Rejoinder in Demurrer	-	-	377
Paper books	-	-	378
Argument	-	-	379
Judgment	-	-	380
Costs	-	-	380

THE RETURN.] *By whom made; Persons.*—The return to the writ should be made either by those to whom such writ is directed, *(b)* or who *are legally competent to execute it, *(c)* either by virtue of stat. 1 [*341] Wm. 4, c. 21, s. 4, or otherwise, *(d)*. Thus, where a writ was directed to bailiffs, &c., being the governing body, to swear in other bailiffs, which writ was served upon the defendants, who by affidavits on motion alleged that they had sworn in others to the office, it was held that defendants should make return; for if the bailiffs they had sworn in should not have been duly elected, they, the defendants, would still continue bailiffs, *(e)* and therefore legally competent to execute the writ. But where a writ was directed to bailiffs and constables, and the return was by the deputy constable, it was held ill, because the return was not made by those to whom the writ was directed, *(f)*. So also where the writ was directed to "the aldermen, bailiffs, and commonalty," and the return was by the bailiffs and capital burgesses without the commonalty, the return, for the same reason, was held to be bad, *(g)*. So where the writ directed to "the mayor, aldermen, common council, and chamberlain of a city," was returned by the mayor and commonalty, the return was quashed, because those to whom it was directed had not returned it, *(h)*. But a return by "the mayor, alderman, and common council," to a mandamus directed "to the mayor and aldermen of, &c." is good for a return by a right name to a writ directed by a wrong name is good, *(i)*.

—.] *Corporations.*—Where a corporation aggregate, to which a mandamus is directed, has regularly resolved upon and made a return, individual dissentients cannot be allowed to dispute its propriety; *(j)* so

(b) Prin's case, 1 Keb. 540, per Keeling, C. J. R. v. St. John's Coll., Skin. 363. R. v. Patrick, 2 Keb. 67. Com. Dig. tit. "Man." D. 1 Bac. Abr. tit. "Man." (I.) Ante, p. 210, n. *(j)*.

(c) R. v. Dolgelly Union, 8 A. & E. 564.† S. C. 3 N. & P. 542. R. v. Patrick, 2 Keb. 67. See ante, p. 313, n. *(e)*.

(d) See stat. App., and as to Ireland, stat. 9 & 10 Vict. c. 113, App.

(e) R. v. Clitheroe (Town), 6 Mod. 133. R. v. Hoskins, Cas. t. Hark. 188. Com. Dig. tit. "Man." D. 1.

(f) R. v. the Bailly, &c., 1 Keb. 33. Catchin v. Wargar, B. R. 23 Car. 1. Rot. 241. there cited.

(g) 1 Keb. 34, supra, n. *(f)*.

(h) Harcourt v. Fox, Comb. 213: the proper motion in such case is, to move that the person to whom the writ is directed shall return it.

(i) Ante, p. 318, n. *(g)*. R. v. Mills, 1 Keb. 623. See ante, "Writ" (Direction), p. 318, 319.

(j) R. v. St. Andrews (Parish), 7 A. & E. 284.† S. C. W. W. & D. 395.

that if two separate returns be made by different portions of the same corporation, the Court will take that which appears to be made by the majority.(*k*)

A return by a municipal corporation cannot be made by a majority thereof without the concurrence of the mayor, whose consent makes the majority;(l) but if a majority without such concurrence make a return *in the name of the mayor, yet it shall be taken to be his return [*342] if he do not duly disavow it.(*m*)

As the return of such a corporation should be made by the majority thereof, so it should not be made by the mayor alone without the sanction of such majority;(n) yet a return to a writ, directed to a municipal corporation, whether or not it be in fact the return of a majority, and notwithstanding it may, upon its face, appear to be made by the mayor alone, is sufficient, and the majority, if made without their consent, cannot disavow it, although the mayor, in such a case, is liable to be punished by criminal information and attachment; for as of a municipal corporation the mayor is the principal and proper person to bring in the writ, so the Court will receive it of him, and will not examine upon affidavits, whether or not there may have been the consent of a majority, the act of the mayor being, as before stated, the act of the majority.(o) But, as before stated, if the mayor, in making such return, whether good or not in law, or true or false as to the matter of fact, falsely allege that it is the return of others also, it is a contempt for which an attachment will be granted.(p)

If the writ be not returned, because the mayor and others to whom it is directed are of different opinions, the Court, instead of granting an attachment, will by consent direct the truth of the disputed point to be tried on a feigned issue.(q)

—.] —. In *Cases within Stats.* 1 Wm. 4, c. 21 (*E.*), and 9 & 10 Vict. c. 113 (*I.*)—In cases within the stat. 1 Wm. 4, c. 21, s. 4 (*E.*),(*r*) (which embraces matters having relation to all offices, franchises,

(*k*) Gude's Cr. Pr. 191. See *infra*, tit. "Returns by Several," &c.

(*l*) See *post*, p. 342, n. (*o*) R. v. Abingdon (Mayor), 12 Mod. 308, and cases there cited. R. v. The Bailly, &c., 1 Keb. 34. Bac. Abr. tit. "Man." (II.)

(*m*) R. v. Chapman, 6 Mod. 152. R. v. Monday, Cowp. 538. R. v. Abingdon (Mayor), 2 Salk. 431; and see 2 Salk. 701. See *post*, tit. "Disavowing return."

(*n*) R. v. Abingdon (Mayor), 12 Mod. 308. R. v. The Bailly, &c., 1 Keb. 34. Bac. Abr. tit. "Man." (II.)

(*o*) Ante, p. 341, n. (*l*). R. v. Abingdon (Mayor), 2 Salk. 431, 432. S. C. Carth. 500. S. C. 12 Mod. 308. S. C. Holt, 440. S. C. Ld. Raym. 559. Prin's case, 1 Keb. 540, per Kneeling, C. J. Powell v. Price, Comb. 41. R. v. Shrewsbury (Mayor), 7 Mod. 203. Com. Dig. tit. "Man." 1. R. v. Hoskins, Cas. t. Hard. 188. R. v. Clitheroe (Town), 6 Mod. 133. Bac. Abr. tit. "Man." (F.), (G.) See *post*, p. 343, n. (*y*).

(*p*) R. v. Hoskins, Cas. t. Hard. 188. R. v. Clitheroe (Town), 6 Mod. 133. Com. Dig. tit. "Man." D. 6. See *supra*, n. (*o*). See *post*, tit. "Attachment."

(*q*) R. v. Rye (Jurates), Burr. 798, and cases there cited. Com. Dig. tit. "Man." D. 6. Bac. Abr. tit. "Man." (II.) n. See *post*, tit. "Feigned Issue."

(*r*) See stat. App., and see as to Ireland stat. 9 & 10 Vict. c. 113 (*I.*), which, as to stat. 19 Geo. 2, c. 12 (*I.*), contains a clause similar to that of stat. 1 Wm. 4, c. 21. See *ante*, p. 313, n. (*t*).

&c., other than such as are mentioned in or provided for by the 9 Ann. c. 20 (E),) the return is thereby directed to be made in the name of the person to whom the writ is directed, but that if the Court so direct, the [*343] *return shall and may be expressed to be made on behalf of such other person as may be mentioned in the rules, and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense. As the words of the above section give the Court a discretion as to admitting an interested party to join in making a return, so it will not in the due exercise of that discretion, permit such third party so to join where his conduct does not appear to be bona fide.(s).

—.] *Application, &c.*—The Court has held that even after a demurrer to a return has been made by the party to whom the writ is directed, and writ of error brought, it will, on a proper case let in the party really interested to make the return.(t)

The permission to join in making the return is obtained by motion to the Court for a rule, calling upon the prosecutors of the writ, and those to whom the writ is directed, to shew cause why the return to the said writ should not be made and joined in the names of those to whom the writ is directed, but expressed to be made and joined on behalf of the applicant, and why the said applicant should not be at liberty to frame such return and conduct the subsequent proceedings thereon at his own expense.(u) In support of such application, there should be affidavits shewing the merits upon which compliance with the writ is withheld, and containing, in analogy with an application under the Interpleader Act,(v) an allegation that such merits are insisted on bona fide.(w)

—.] *Returns by several Corporations, Officers, &c.*—As before stated, where a corporation aggregate, to which a mandamus is directed, has regularly resolved upon and made a return, individual dissentients cannot be allowed to dispute its propriety;(x) and that where separate returns are made by different portions of the same corporation, the Court will take that which is or appears to be made by the majority.(y) If, however, the writ be directed to several independent corporate bodies, officers, or persons, although they may not have separate or distinct legal capacities, yet each may make a separate return,(z) or a joint one, and either upon the original [*344] writ or the copies with which they *have been served.(a) If, however, as before stated in the case of a mayor, one make a return in

(s) R. v. Cheek, 16 L. J., N. S. 65, M. C.

(t) R. v. Paynter, 7 Q. B. 255,† S. C. 14 L. J., N. S. 182, Q. B., per Patteson, J.

(u) R. v. Cheek, 16 L. J., N. S. 65, M. C. As to motion, &c., see ante, p. 295, 297.

(v) See stat. 1 & 2 Wm. 4, c. 58, App., and stat. 9 & 10 Vict. c. 113 (L.)

(w) R. v. Cheek, 16 L. J., N. S. 65, M. C. See stat. 1 & 2 Wm. 4, c. 58, App.

(x) Ante, p. 341, n. (j). R. v. St. Andrew (Parish). 7 A. & E. 284.†

(y) Gude's Cr. Pr. 191. Supra, p. 341.

(z) R. v. The Bailly, &c., 1 Keb. 34. R. v. St. Saviour's Parish, 7 A. & E. 925.† S. C. 3 N. & P. 126. S. C. 1 N. & P. 496,† (where see several returns).

(a) Gude's Cr. Pr. 184, ante, p. 320.

the name of another without his priority and consent, and action on the case lies against him, and such an act is an offence for which the Court will grant a criminal information and attachment. *(b)*

—.] *When Return to be made.*—By the stat. 9 Ann. c. 20, s. 1, *(c)*, it is enacted that a return to a mandamus for admitting or restoring to any office or freedom in a municipal corporation shall be made on or before the return day of the first writ; *(c)* and if default be made, the Court of B. R. will, on affidavit of service of the writ, grant a peremptory mandamus, and after that an attachment, *(d)* the provisions of which statute have, by the subsequent act of 1 Wm. 4, c. 21, *(e)* been extended to writs of mandamus in all other cases. The Court will, however, on motion supported by the necessary affidavits, grant further time within which to make the return. *(f)* Before the expiration of the original time, if no further time have been granted by the Court, the defendant must duly file his return at the Crown office, according to the exigency of the first writ, that is, on or before the return day therein mentioned, and without a rule for that purpose, *(g)* under pain of an attachment, but the Court will not compel the defendant to return or plead before his time shall expire, in order to give the prosecutor an opportunity to move for a trial at Bar, *(h)* or for any other purpose. *(i)*

—.] *How enforced; Rule to return Writ.*—It has been stated, *(j)* that it is the duty of that defendant upon whom the writ of mandamus has been personally served, to return and file it with his return, on or *before the return day in such writ mentioned, or before the expiration of any further time, the Court may, on application for that [*345] purpose have allowed him; if, therefore, the defendant altogether neglect his duty in this respect, the practice has always been, for the prosecutor, in those cases in which he is unprepared with an affidavit of service

(b) Ante, p. 342, n. *(p)*. R. v. St. John's Coll. Skin. 368. Abingdon Town's case, Carth. 500. S. C. Ld. Raym. 559. R. v. Gloucester (Mayor), 2 Show. 504. Bac. Abr. tit. "Man." (G.)

(c) See ante, p. 7, n. *(u)*, and stats. App. Com. Dig. tit. "Man." D. 2, D. 6. And see also stat. 11 Geo. 1, c. 4, s. 6. Bac. Abr. tit. "Man." (H.)

As to Ireland, see stat. 19 Geo. 2, c. 12, s. 1, 16, App., also citing 11 Geo. 2, c. 4, s. 1, by which it is also enacted, that the return must be made to the first writ.

(d) Mayor of Coventry's case, 2 Salk. 429. See post' tit. "Peremptory Writ."

(e) Ante, p. 7. See App., and as to Ireland, stat. 9 & 10 Vict. c. 113, App.

(f) R. v. Owen, Stra. 669. R. v. Fowey (Mayor), 5 D. & R. 614.† S. C. 2 B. & C. 591.† Canterbury (Archbp.) v. Trin. Coll., 1 Barn. 194; 1 H. & W. 370. See stat. 9 Ann. c. 20, s. 6, App.

As to Ireland, see stat. 19 Geo. 2, c. 12, s. 6, App.

(g) Ante, p. 6; Bull. N. P. 198, 199. Justice v. Jones, 1 Barn. 291. S. C. Stra. 857. R. v. Fowey (Mayor), 5 D. & R. 614.† Com. Dig. tit. "Man." D. 2. Formerly when a return was not made in time, it was necessary to obtain a side bar rule naming a further time, or an attachment would be denied. R. v. Esham (Mayor), 2 Barn. 265.

(h) Anon., 2 Barn. 106.

(i) R. v. St. Andrew's (Parish), 7 A. & E. 281.† S. C. W. W. & D. 395.

(j) Ante, p. 6, n. *(o)*, *(p)*, 328, n. *(v)*, 331, n. *(m)*, *(q)*.

of the writ, to obtain a side bar rule, (which is not peremptory), to "Return the Writ." (*k*)

Prior to the passing of the stat. 9 Ann. c. 20, the rule to "*return the writ*" was not usually granted in any case of mandamus, until an alias and pluries writ had first been severally issued, although the Court had power to grant it sooner; but as that statute restrained the Court from exercising this indulgence of alias and pluries writs in respect of annual offices of municipal corporations only, by compelling a return to the first writ of mandamus, so the practice as to all other cases, except those provided for by such statute, remained as at common law. The granting of the alias and pluries writs having, on account of the delay thereby occasioned, been much complained of, and as such act of 9 Ann. c. 20, had pointed out a direction in one class of cases, so the Court made it the rule of their practice in all; accordingly, it has, since the above statute, been the constant course to grant a rule for a return to the first mandamus in all cases; (*l*) and recently, by the Crown Office Rules, r. 13, it is ordered, that a side bar "rule to return a writ" may be obtained according to former practice, without any actual motion for the same, which rule shall require such return to be made within four days next after the service of such rule if served in London or Middlesex, and within eight days in all other cases. (*m*)

If the writ have not been personally served, a copy of the rule must be served on those to whom it is directed, viz., those to whom the writ and copies were directed or ordered to be served, the original rule being at the same time shown, otherwise the Court will not grant an attachment; (*n*) but if the writ have been personally served, in such case personal service of the rule is unnecessary. (*o*)

If the return be not made and filed according to the exigency of the [*346] rule, the Court will, upon an affidavit of service, and of the non-compliance, grant an attachment. (*p*) As, however, it is not usual for the Court at once to grant an attachment, but only a rule nisi, upon an affidavit of service, both of the side bar rule, and also of the writ and copies, it is more advisable for the prosecutor to be prepared with an affidavit of service of the original writ and copies in the first instance, to avoid the proceeding of a side bar rule, as the Court will, on motion and production of such an affidavit only, grant a rule nisi for an attachment,

(*k*) Gude's Cr. Pr. 184.

(*l*) Ante, p. 6, n. (*p*), 332 (*e*). *Dacosta v. Russia Company*, Stra. 783. S. C. Fitzg. 4. S. C. 1 Barn. 24; stat. 1 Wm. 4, c. 21, s. 2; Com. Dig. tit. "Man." D. 6; 2 Salk. 429; Ld. Raym. 391, 848, 1233; 6 Mod. 25; Skin. 669; Bac. Abr. tit. "Man." (H.) Mayor of Coventry's case, Holt, 440. An affidavit of service was usually produced.

(*m*) See rule, App. As to duration of rule in town cases, *R. v. Bettesworth*, Stra. 857, 956, 1111. S. C. 7 Mod. 218.

(*n*) *R. v. North Rid. (J.)*, 7 Q. B. 155.†

(*o*) Gude's Cr. Pr. 184. See ante, p. 331, n. (*n*).

(*p*) See rule ante, p. 6, n. (*o*), 331, n. (*q*). See post, tit. "Attachment."

without resorting to a side bar rule, so that the trouble and delay of a side bar rule and service may thus be avoided altogether. (*q*)

THE RETURN.] *When necessary*.—In the preceding Chapter we have shewn, that the mandatory clause of the writ commands in the alternative, that is, either to perform the act or duty therein stated, or to shew cause, &c., therefore the defendant may at once proceed to the execution of the writ; which course, though he pursue, yet strictly he should make a return that he has done so, (*r*) it having been decided, that the Court will not only refuse to supersede the writ, on affidavit that its mandatory clause was obeyed before the writ was granted, (*s*) but will rigidly adhere to the incontrovertible maxim of law upon this subject, that “the writ must be *returned* as executed, or its execution legally excused (*t*) or justified.”

Where the command of the writ is executed, the form of return is nothing more than a succinct statement that the writ has been complied with, following the words of the mandatory clause, and adding “as by the aforesaid writ is commanded.” (*u*)

If, however, by the arrival of the return day, or by the expiration of any further time for the return, the defendant may not have had sufficient time to execute the command of the writ, such a fact may be returned, by stating that “from time to time divers matters and things have been executed for the purpose of complying with the writ, and that further matters and things are in the course of procedure.” (*v*)

*The writ need not be answered, where the return is to the jurisdiction of the Court, (*w*) nor in such a case can the prosecutor effectually take exceptions to such return, because the writ is bad. (*x*)

If the defendant do not intend to perform the act or duty commanded by the mandatory clause of the writ, nor to subject himself to an attachment, he must proceed to obey the alternative part of such clause by making “a return” thereto, which usually consists either of traverses which contradict some material suggestion or ground of the writ, or of a special statement of the merits of the defendant’s case, which latter, on account of its great importance and difficulty in framing, should in general be prepared and settled by counsel; (*y*) for notwithstanding how dif-

(*q*) Gude’s Cr. Pr. 184, 185.

(*r*) Ante, p. 6, n. (*n*), 340, n. (*a*). R. v. Milverton (Manor), 3 A. & E. 286, † n. (*d*); Bull. N. P. 201.

(*s*) Anon., 1 Barn. 362.

(*t*) Latch. 229, per Keeling, C. J.; 2 Keb. 168. R. v. Lyme Regis (Mayor), 1 Doug. 154. Bagg’s case, 11 Rep. 93 b. R. v. Clapham, 1 Vent. 111. R. v. Abingdon (Mayor), 2 Salk. 432. S. C. Ld. Raym. 559. S. C. Holt, 436, 438, 441. R. v. Stirling, Say. 174. Bac. Abr. tit. “Man,” (I.) See ante, p. 340, n. (*a*).

(*u*) R. v. Lowton Parish, 11 Mod. 301. See “Mandatory Clause,” p. 323.

(*v*) R. v. Ouze Bank Commissioners, 3 A. & E. 549, 556, † per Littledale, J. See also Stra. 763. S. C. Ld. Raym. 1479, as to return of “tarde,” and also ante, tit. “Drainage” (Rate, Return), p. 121.

(*w*) R. v. Patrick, 1 Keb. 611.

(*x*) R. v. New Coll., 2 Lev. 15.

(*y*) Bull. N. P. tit. “Man.” Com. Dig. tit. “Man.” Gude’s Cr. Pr. 183.

feult soever the framing of a return may be, the Court will not assist the defendant, nor direct how it shall be made.(z)

—.] *Species of Return.*—Returns to writs of mandamus are of three kinds: 1st. *Traverses*; 2nd. Special Returns, or those of confession and avoidance; 3rd. A statement in the nature of a Demurrer to the writ.

Before we proceed to consider returns agreeably with the above analysis, we wish to make mention, in order to avoid repetition, of a few points which have relation to returns in general.

—.] *Description of Defendants.*—The return, as to the description of those making it, should be expressed according to its legal operation, and should not set out the actual fact or facts in extenso. Thus, a return made by the mayor and major part of the aldermen, &c., should be expressed to be by the mayor, aldermen, &c.; for the act of the mayor and a majority of a corporation, is the act of the whole.(a) So where a writ was directed to the head of a college by his Christian and surnames, a return, though neither subscribed by him, nor under the common seal, was held to be good; the latter not being necessary, because the writ was not directed by the corporate name.(b) But where a return was expressed in this form, “*we do humbly certify that did nominate and appoint, &c.,*” omitting “*we,*” the return was disallowed.(c)

As to the return or waiver of a misnomer of the defendant, see ante, p. 318, 319.(d)

—.] *Relation of Return as to Time.*—The return to a writ [*348] of *mandamus as to the time of its being made, has legal relation to the teste and date of the writ; and in framing a return, this presumption should be steadily kept in view, or the return may be successfully objected to for insufficiency.(e)

—.] 1st. *Return by way of Traverse.*—In the first place we will treat of the *form* of a traverse, and in the second, as to the *substance*.

—.] *Form of Traverse.*—It has been stated in several parts of this work.(f) that the general rules of pleading are applicable to cases of mandamus, and their incidental proceedings; which observation has no greater force than when it has reference to returns by way of traverse, the form of such returns having been constantly said to be the same as that of common traverses in a personal action.(g)

The traverse should, in terms, follow the suggestion or supposal of the

(z) Com. Dig. tit. “Man.” D. 2. See ante, p. 308, 309.

(a) R. v. Shrewsbury (Mayor), 7 Mod. 203. R. v. Abingdon (Mayor), 2 Salk. 431, 432. Dighton v. Stratford-upon-Avon, 2 Keb. 641. S. C. Ray. 188.

(b) R. v. St. John's Coll., 4 Mod. 241. S. C. Skin. 368. S. C. Ld. Raym. 126, 564. Thetford's case, 1 Salk. 192.

(c) R. v. Lancaster (J.), 2 Barn. 430.

(d) R. v. Ipswich (Bailiffs), 2 Salk. 434. S. C. Ld. Raym. 1233. S. C. Holt, 433.

(e) R. v. Round, 4 A. & E. 142.† S. C. 5 N. & M. 427.† S. C. 1 H. & W. 546.

(f) Ante, p. 8, n. (y), 309, n. (f).

(g) See Steph. on Plead. Ind. tit. “Traverse.” See forms of traverse, ante, p. 73, 194.

writ ;(h) for if any legal fact, necessarily supposed for the purposes of the writ fail, the foundation of the writ fails.(i) Also, as the prosecutor is supposed to know his own title best, so he is bound by the terms in which he alleges it ; therefore if the title, as he states it, be denied by the return, it is enough ;(j) which doctrine is precisely the same as one which obtains, as to traverses in personal actions, namely, that "*a party may, in general, traverse a material allegation of title or estate, to the extent to which it is alleged, though it need not have been alleged to that extent.*"(k) Thus if the writ be generally to "swear in those chosen ;" the return may be generally, that "they were not chosen," for the exact supposal of the writ is alone traversed ; so for the like reason, if the writ specially set forth that "they were chosen '*debito modo*,'" the return may, in such case, traverse "that they were not chosen *debito modo* but such a (non *debito modo*) return to a general writ, without such words (*debito modo*) has been often held to be ill,(l) *as being a negative pregnant, which formerly was held to be a fatal defect, but which, at this [*349] day, would scarcely be held to be a good ground of demurrer.(m)

The traverse must not be too large, by being in the conjunctive, as "not duly elected, and admitted and sworn ;" but should be in the disjunctive, "not duly elected, or admitted or sworn."(n) A similar rule obtains as to traverses in personal actions.(o)

—.] *Substance of Traverse.*—As to the substance of a return by way of traverse, it is a rule that every distinct and material allegation contained in the writ,(p) must, if it be intended to contradict them be traversed.(q)

(h) See ante, p. 8, n. (y). Lambert's case, Carth. 170. R. v. Dover (Mayor), 16 L. J., N. S. 97, M. C. ; Bac. Abr. tit. "Man." (1.) ; 2 Salk. 434 ; 5 Mod. 11 ; Stra. 1235 ; 1 Show. 253 ; Andr. 195.

(i) R. v. Williams, 8 B. & C. 683. S. C. 3 M. & R. 404, per Parke, J.

(j) R. v. Lyme Regis (Mayor), 1 Doug. 81 a. R. v. Malden (Mayor), Ld. Raym. 481. S. C. 2 Salk. 431.

(k) Steph. on Pl. 282, 5th edit.

(l) See ante, p. 73. R. v. Twitty, 7 Mod. 83. S. C. 2 Salk. 433. S. C. Holt, 442 ; 16 L. J., N. S. 97, M. C., supra ; Cas. t. Hard. 130, n. (1) ; Com. Dig. tit. "Man." D. 3. R. v. Hill, 1 Show. 253. Lambert's case, Carth. 170. S. C. 12 Mod. 3. R. v. Aldborough (Mayor), 10 Mod. 100. S. C. 1 Keb. 308. R. v. Williams, 8 B. & C. 683.† S. C. 3 M. & R. 405. R. v. Lyme Regis (Mayor), 1 Doug. 80, 81 a, 83, 84. Crawford v. Powell, Burr. 1013. R. v. Taunton St. James, Cowp. 413. See R. v. Kelk, 12 A. & E. 559.† R. v. Hereford, 1 Keb. 655, 660, 716. S. C. 1 Sid. 209, 210. R. v. Chester (City), 5 Mod. 11. R. v. Ward (Dr.), 2 Keb. 284.

(m) R. v. Chester (City), 5 Mod. 11. R. v. Ward (Dr.), 2 Keb. 284. R. v. Lyme Regis (Mayor), 1 Doug. 80, 84. R. v. Maidstone (Corp.), 1 Keb. 660, 665, 733. Hereford's case, 1 Keb. 716. S. C. 1 Sid. 209. R. v. York (Mayor), 5 T. R. 75. See Steph. on Pl. 419, 421, 422, 5th edit.

(n) R. v. Lyme Regis (Mayor), 1 Doug. 79, 85 ; Steph. on Pl. 281, 5th edit. ; Com. Dig. tit. "Man." D. 3 ; Bac. Abr. tit. "Man." (1.), n.

(o) See Steph. on Pl. 281, 5th edit.

(p) Anon., 2 Barn. 106. See form of traverses, 1 G. & D. 343 ; also with an *absque hoc*, 2 B. & Ad. 200.† See stats. 9 Ann. c. 20, s. 2 (E.), and 1 Wm. 4, c. 21 (E.), App. and 19 Geo. 2, c. 12 (1.), and 9 & 10 Vict. c. 113 (1.), App. See Steph. on Pl. 278, 5th edit.

(q) R. v. York (Mayor), 5 T. R. 70. R. v. Ward, Fitzg. 195. R. v. Saltash (Mayor), Raym. 432. S. C. Jon. 177. R. v. Williams, 8 B. & C. 683.† S. C. 3 M. & R. 405. R. v. London (Mayor), 3 B. & Ad. 276.† R. v. Durham (Mayor), Burr.

As such of the material suggestions and allegations of the writ, which are not denied or traversed by the return, are, in contemplation of law, admitted by the defendant to be true; *(r)* so the return should be so framed that the defendant does not estop himself from relying on all the merits of his defence. Thus, where a return to a mandamus to compel the affixing of a common seal, merely insisted on the right to withhold consent, and to refuse the seal; the Court held, that the defendant could not object that there was no corporate resolution under seal, nor that the writ inefficiently stated the custody of the seal, nor that no presentation had been actually tendered for signature, nor that the majority having only voted orally, might retract their resolution. *(s)* So where the defendant has admitted a particular fact, for one purpose, he cannot, by the same return, deny the truth of such fact for another. *(t)*

A traverse of immaterial matter is, however, bad. *(u)*

*Whilst the common law strictness, as to the certainty requisite [*350] to a return prevailed, many cases were decided, in which returns were held to be bad, because defective for that description of uncertainty termed "negative pregnant," that is "such a form of negative expression as implied or carried within it an affirmative; thus a return of non fuit debito modo electus, to a writ which merely alleged an "election" has been, for such cause, held to be bad; *(r)* and also a return which alleged "non fuit amotus per nos." *(r)* So a return of "nunquam fuit debito modo admissus," has been held to be a bad return; the Court holding that it should have been non fuit admissus generally, and the alleged ground of the decision was, that if the return were false, the prosecutor could not upon such an allegation, found an action upon the case for a false return. *(r)* A difference of construction has, however, been held to exist between "debitè amotus" and "non debitè electus" or "admissus," in this, that non debite electus implies "elected," and therefore must shew how which is otherwise in the case of debitè amotus. *(y)* It has also been held that a return which alleged that a corporate body were not duly assembled, to proceed to the election of a recorder, was bad, because it

129. R. v. Kelk, 12 A. & E. 559.† S. C. 4 P. & D. 185. R. v. Brancaster (Churchwds.), 7 A. & E. 459.† S. C. 2 N. & P. 580. R. v. Payn, 6 A. & E. 404.† S. C. 1 N. & P. 524.† See *infra*, n. *(r)*.

(r) *Supra*, n. *(q)*. R. v. Buckingham (Corp.), 10 Mod. 74. R. v. Thames (Commissioners), 5 A. & E. 804.† R. v. Ipswich (Bailiffs), Salk. 434, 16. S. C. Ld. Raym. 1233. S. C. Holt, 443.

(s) R. v. Kendall, 1 Q. B. 366.† S. C. 4 P. & D. 602. S. C. 10 L. J., N. S. 137, Q. B.

(t) R. v. Bettesworth, 1 Barn. 299.

(u) R. v. Eastern Counties Railway, 10 A. & E. 562.† S. C. 4 P. & D. 48. But see R. v. Penrice, Str. 1235. R. v. Lyme Regis (Mayor), 1 Doug. 81 a.

(v) *Ante*, p. 73, 309, n. *(h)*, 349, n. *(m)*. Manaton's case, Ray. 365. Hereford's case, 1 Sid. 209, 210; 1 Show. 253. Lambert's case, Carth. 170; Com. Dig. tit. "Man." D. 5; Steph. on Pl. 421; Bac. Abr. tit. "Man." (l.) See *post*, p. 353.

(w) Com. Dig. tit. "Man." D. 5. But see Lucas v. Colchester (Mayor), P. 19, 3, cited in Hereford's case, 1 Sid. 210. S. C. 1 Keb. 655. See *ante*, p. 194 *(z)*.

(x) Hereford's case 1 Sid. 209. S. C. 1 Keb. 655, 716, 733; Bac. Abr. tit. "Man." (l.) R. v. Williams, 8 B. & C. 681. S. C. 3 M. & R. 405.

(y) R. v. Chester, (Mayor,) Comb. 398. S. C. 5 Mod. 5. See *supra*, n. *(w)*.

contained a negative pregnant;(z) but it has also been held, that a return of "elected," shall mean debite modo electus, for non præstat impedimentum quod de jure non sortitur effectum.(a)

The defect that a return in a "negative pregnant," is at this day discountenanced by the Courts.(b)

In accordance with the rule which obtains as to traverses in a personal action;(c) so in mandamus cases "a traverse cannot be of matter of fact, not alleged in the writ," that is, neither actually nor by legal supposition or implication. Yet a traverse will be good if it pursue and deny a material suggestion of the writ, which though not expressly alleged, is implied by law. Thus where the writ suggested, that A. was chosen in Easter week, a return which traversed that A. was so elected has been held good.(d)

*The cases on the subject of mandamus also shew that the [*351] pleading rule, namely, that "matters of law, resulting from a statement of facts, cannot be traversed," has application to returns by way of traverse. Thus the conclusion, "by reason of which premises, W. &c., was duly elected, &c.," is matter of law for the decision of the Court upon the facts, some one of which should have been traversed; e. g., that he had fifty votes, &c.; for it is one of the first principles of pleading,(e) that facts alone should be stated which must be done for the purpose of informing the Court, whose duty it is to declare the law arising upon those facts, and to apprise the opposite party of what is meant to be proved, in order to give him an opportunity of answering or traversing it.(f)

If on the one hand a return by way of traverse be legally defective, it may be quashed, either on motion, or upon demurrer;(g) but the defendant may, if he can, on the argument, impeach the validity of the writ.(h)

(z) *R. v. York (Mayor)*, 5 T. R. 66. Bac. Abr. tit. "Man." (I.)

(a) *Manaton's case*, Raym. 365.

(b) Ante, p. 348, 349, n. (m). See Steph. on Pl. 421, 5th edit.

(c) Steph. on Pl. 223, 5th edit.

(d) *R. v. Penrice*, Stra. 1235. *R. v. St. John's Coll.*, Skin. 359. *Lambert's case*, Carth. 170. *R. v. Patrick*, 2 Keb. 164; 18 Hen. 8, 5, 34 Hen. 6, 49. *R. v. Hill*, 1 Show. 253. *R. v. Williams*, 8 B. & C. 683,† n. (a). *R. v. Round*, 4 A. & E. 142.† S. C. 5 N. & M. 427.† *R. v. Lynne*, (Mayor), Andr. 105. *R. v. Lyme Regis (Mayor)*, 1 Doug. 81 a. *Wright v. Fawcett*, Burr. 2044, per Aston, J. Anon. Ray, 431. Com. Dig. tit. "Man." D. 3, D. 4. *R. v. Malden (Bailiffs)*, 2 Salk. 431. S. C. Ld. Raym. 481. *R. v. Abingdon (Mayor)*, 2 Salk. 432. S. C. Ld. Raym. 559. *Braithwaite's case*, 1 Vent. 19. *R. v. New Windsor (Mayor)*, 7 Q. B. 917.† S. C. 14 L. J., N. S. 319, Q. B. See Steph. on Pl. 220, 5th edit.

(e) Steph. on Pl. p. 220, 5th edit.

(f) *R. v. York (Mayor)*, 5 T. R. 70. *R. v. Lyme Regis (Mayor)*, 1 Doug. 159, 159, n. (F.). *R. v. Liverpool (Mayor)*, Burr. 731, 732. *R. v. Hughes*, 4 B. & C. 379.† *R. v. Bristol Dock*, 2 Q. B. 64.† S. C. 1 G. & D. 286. S. C. 2 Rail. Cas. 599. Bac. Abr. tit. "Man." (I.)

(g) Ante, p. 7. *R. v. Eastern Counties Railway*, 10 A. & E. 562.† S. C. 4 P. & D. 48. *R. v. Lyme Regis (Mayor)*, 1 Doug. 85. *R. v. Brancaster (Churchwardens)*, 7 A. & E. 458.† S. C. 2 N. & P. 580, supra. *R. v. Kendall*, 1 A. & E., N. S. 366. S. C. 4 P. & D. 603. S. C. 10 L. J., N. S. 137, Q. B.

(h) *Clarke v. Leicestershire Canal*, 6 Q. B. 898.† See post, tits. "Quashing Return," "Demurrer," and ante, p. 338.

If, on the other hand, it be legally sufficient, issue may be joined thereon, *(i)* in either of which cases the matter proceeds as in the cases of ordinary actions.

—.] 2nd. *Special Returns, or those in Confession and Avoidance.*— Having treated of a return by way of traverse, we now proceed to the consideration of one in *confession and avoidance*, which we propose to treat in the following order, viz., first, as to its form, and secondly, as to its substance.

— Form.—As before stated, *(j)* when the defendant seeks either [*352] *to excuse or justify the non-execution of the writ, he must, by his return, in direct terms state the grounds of his excuse or justification, and must, under pain of an attachment, make the best return his case admits of. *(k)*

In framing the return, it is incumbent on the defendant to set out the whole legal facts of his case in extenso, in order not only that the Court, whose duty it is to declare the law arising upon those facts, may have the means both of judging of the legality of such excuse, &c., *(l)* and also the means of ascertaining whether the command of the writ have been complied with, *(m)* but also in order to apprise the prosecutor of the grounds of the defendant's defence, in order to afford him an opportunity of answering or traversing them by his plea; therefore the return will not be sufficient if made in general terms. *(n)* A special return must not only be good in substance, but must be expressed in apt words; *(o)* or, in other words, the language and the rules of pleading in personal actions should be adopted. *(p)*

The return must not be evasive nor contemptuous, *(q)* nor frivolous, *(r)* nor nonsensical, *(s)* or the Court will quash it either on motion or demurrer, and grant a peremptory mandamus. Thus, in an extreme case, where certain justices made a shuffling return that a rate was not made *secundum actum Parlamenti*, the Court granted an attachment. *(t)* So

(i) Ante, p. 7. R. v. Brancaster (Churchwardens), 7 A. & E. 458.† S. C. 2 N. & P. 580. See post, tits. "Replication," "Issue."

(j) Ante, p. 194, 195, n. *(e)*, 340, n. *(a)*, and "Form of Traverse," p. 348.

(k) See ante, p. 6, n. *(o)*, 194, 195, n. *(e)*, *(f)*. R. v. Long, 1 Barn. 82. R. v. Raines, 3 Salk. 232, and see ante, 319, n. *(l)*, as to estoppel.

(l) Ante, p. 195, n. *(e)*. R. v. Staffordsh. (J.), 6 A. & E. 84.† S. C. 1 N. & P. 277.† See infra, tit. "Demurrer."

(m) R. v. Onze Bank (Commrs.), 3 A. & E. 548.† See supra, n. *(l)*.

(n) See ante, p. 348, n. *(f)*. R. v. Onze Bank Commrs., 3 A. & E. 544.† R. v. Bristol Dock, 1 G. & D. 289. S. C. 2 Q. B. 64.† S. C. 2 Rail. Cas. 599.

(o) London (City) v. Estwick, Sty. 32. See ante, p. 399, n. *(d)*, *(e)*.

It has been decided that a return which stated the "year" in Roman figures, was not for that cause invalid. Butler (Dr.) v. Cobbett, 11 Mod. 225.

(p) Ante, p. 8, n. *(y)*. R. v. Shrewsbury (Mayor), 7 Mod. 203, where the word "duly," in a return, is held to be a sufficient allegation, as in an ordinary pleading. See supra, n. *(o)*.

(q) R. v. Payn, 6 A. & E. 405.† S. C. 1 N. & P. 524. S. C. W. W. & D. 99.

(r) R. v. Robinson, 8 Mod. 336. R. v. Payn, 6 A. & E. 406.† S. C. 1 N. & P. 524.† See post, tit. "Attachment."

(s) R. v. Onze Bank Commrs., 3 A. & E. 544.† and see 10 A. & E. 556.†

(t) Cited in R. v. Long, 1 Barn. 82. If the prosecutor intend to treat the

where to a mandamus to elect a mayor, to be chosen out of the aldermen, the return was that "there were no aldermen," the Court held the return to be frivolous, and granted an attachment against the defendant.(u)

*The return must be neither inveigling nor hypothetical, for if [*353] it have either of such defects, the Court will quash it.(v)

The averments of the return must be certain.(w). The certainty required by the common law.(x) is by some of the cases stated to have been *certainty to every intent*, and therefore a greater certainty than is requisite to a plea.(y) Other cases have decided that the certainty or strictness which prevailed at common law was the same as that which governed estoppels, indictments, or returns to writs of habeas corpus;(z) and as to them, it is laid down that nothing is to be taken or construed by intendment or inference, so that all material facts should be positively and distinctly alleged.(a) Thus it has been held not to have been sufficient to return such matter as might be falsified in an action for a false return, but that it was necessary so to aver legal facts that the Court might be able to judge of them, and determine whether they formed an excuse or justification sufficient in law or not,(b) which strictness was required, because the prosecutor at common law (previously to stat. 9 Ann. c. 20, (E.), or stat. 19 Geo. 2, c. 12 (I.)), could neither traverse, interplead,(c)

return as a contempt, upon matter shewn in the affidavits, he should proceed by way of motion for an attachment. R. v. Round, 4 A. & E. 139.† S. C. 5 N. & M. 427.† R. v. Payn, 6 A. & E. 404.† S. C. 1 N. & P. 524.†

(u) R. v. Robinson, 8 Mod. 336. R. v. Payn, 6 A. & E. 406.† S. C. 1 N. & P. 524. See supra, n. (r).

(v) R. v. Old Hall Manor, 10 A. & E. 253, 254.† S. C. 2 P. & D. 518. S. C. W. W. & D. 650. R. v. Norwich (Mayor), Ld. Raym. 1244. S. C. 2 Salk. 436, 17.

(w) R. v. London Dock, 5 A. & E. 163.† S. C. 6 N. & M. 390.† The Court will, in most cases, allow an amendment. See post, p. 368, 369.

(x) R. v. Lyme Regis (Mayor), 1 Doug. 154. Bagg's case, 11 Rep. 93 b. R. v. Clapham, 1 Vent. 111. R. v. Abingdon (Mayor), 2 Salk. 432. S. C. Ld. Raym. 559. S. C. Holt, 436, 438, 441. S. C. Fitzg. 194. R. v. Stirling, Say. 174. Bac. Abr. tit. "Man." (I.)

(y) Bull. N. P. 201. R. v. Exeter (Mayor), 1 Show. 365. S. C. 4 Mod. 36, 37, and cases there cited. R. v. Lyme Regis (Mayor), 1 Doug. 153. R. v. Richardson, Burr. 517. R. v. Cambridge (U.), Stra. 559. Waggoner's case, 8 Rep. 122. R. v. Doncaster (Mayor), Ld. Raym. 1564. S. C. Say. 37. R. v. Liverpool (Mayor), Burr. 723. R. v. St. Andrew (Parish), 10 A. & E. 738.† R. v. Abingdon (Mayor), 2 Salk. 432. S. C. Ld. Raym. 559.

(z) R. v. Lyme Regis (Mayor), 1 Doug. 83, 84, 153, per Buller, J., 158. R. v. Hutchinson, 8 Mod. 101, n. (d). S. C. Fort. 204. R. v. York (Mayor), 5 T. R. 69. R. v. Bristol Dock, 6 B. & C. 186.† S. C. 9 D. & R. 309.†

(a) R. v. Cambridge (Mayor), 2 T. R. 458. Patrick's case, Raym. 103.

(b) Ante, p. 352, n. (t). Bac. Abr. tit. "Man." (I.), cited in R. v. Kendall, 4 P. & D. 615. S. C. 1 Q. B. 366.† and cases there cited. R. v. Gloucester (Mayor), 3 Bulst. 189. S. C. 1 Roll. 409. S. C. 2 Show. 504. R. v. Exeter (Mayor), Comb. 197. R. v. Stirling, Say. 174, per Ryder, C. J. R. v. Dr. Harris, 1 W. Blac. 430. S. C. Burr. 1420.

(c) Ante, p. 7. R. v. Abingdon (Mayor), 2 Salk. 432. S. C. 12 Mod. 401. S. C. Carth. 499. S. C. Ld. Raym. 559. S. C. Holt, 436, 438, 441. Com. Dig. tit. "Man." D. 5. R. v. Litchfield (Ep.), 7 Mod. 217. S. C. 1 Kel. 287. S. C. 2 Barn. 365, 429. R. v. Cooper's Company, 7 T. R. 546. R. v. Lyme Regis (Mayor), 1 Doug. 83, 84, 155. Protector v. Kingston-upon-Thames, Sty. 481. But see Exeter

[*354] *nor reply as to a plea in a personal action, (*d*) and it was at least doubtful whether a writ of error lay; (*e*) so that the return was then conclusive, (*f*) except that the prosecutor might, if it were false in fact, avail himself of the collateral proceedings by way of action on the case, or information for a false return. (*g*)

Notwithstanding this rigor of the common law as to "certainty," the consequent difficulty of framing returns, and the hardship upon defendants, yet as the passing of the stat. 9 Ann. c. 20, was intended for the benefit of persons *suing* out writs of mandamus, in certain cases the Court soon and constantly decided that such statute did not take away the strictness which the common law required as to returns, (*h*) or in other words, that the same strictness in returns was equally necessary after as before the statute. (*i*) In process of time, however, the Court of B. R., in their decisions, somewhat departed from the strictness of the common law, and by a current of authority gradually established the more liberal rule, viz., that the certainty necessary to a return is "*certainty to a certain intent in general*," which means that which upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear. Thus, if the return be certain upon the face of it, that is sufficient, as the Court cannot presume facts inconsistent with it for the purpose of making it bad; for it has been judicially observed, that if such presumptions were to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return. (*j*)

The following is a statement of some of the decisions as to "*certainty*" in a *return*, which are here inserted, in order that the reader may ascertain from the cases the nature of the certainty required. Thus, a [*355] *return of "*non fuit tempore receptionis brevis deputatus constitutus*" has been held to be nought, for though the prosecutor may have been made deputy, and before the receipt of the writ improperly

(Ep.) v. Hele, Show. P. C. 88, 96. R. v. St. Andrews, 10 A. & E. 736.† R. v. Glide, 12 Mod. 29. R. v. Rippon (Town), 2 Keb. 15. Bac. Abr. tit. "Man." (K.) See stats. App.. See post, tit. "Pleas."

(*d*) 7 T. R. 546, supra. n. (*c*). Manaton's case, Raym. 365. R. v. Slatford, 5 Mod. 317. S. C. 2 Salk. 428. S. C. Comb. 419. S. C. Holt, 438.

(*e*) Ante, p. 7. R. v. Hull, 11 Mod. 390. S. C. Ld. Raym. 1447. Bagg's case, 11 Rep. 93 b. See post, tit. "Error."

(*f*) R. v. Clapham, 1 Vent. 111. S. C. 1 Lev. 306. S. C. 2 Keb. 742. Com. Dig. tit. "Man." D. 5.

(*g*) Ante, p. 6, n. (*r*), and see post, tit. "Action and Information for false return."

(*h*) R. v. Lyme Regis (Mayor), 1 Doug. 154. S. C. Andr. 105. R. v. Liverpool (Mayor), Burr. 733.

(*i*) R. v. York, (Mayor), 5 T. R. 69, supra. R. v. Pomfret, 10 Mod. 103. R. v. Lyme Regis (Mayor), 1 Doug. 157, per Ld. Mansfield, C. J. R. v. Shrewsbury (Mayor), 2 Barn. 394. R. v. Liverpool (Mayor), Burr. 733, per Denison, J. R. v. Doncaster (Mayor), Burr. 741. R. v. Weymouth (Borough), 7 Q. B. 46.†

(*j*) R. v. Lyme Regis (Mayor), 1 Doug. 159, per Buller, J. R. v. Monmouth (Mayor), 4 B. & A. 497.† R. v. Carmarthen (Mayor), 1 M. & S. 697. Bac. Abr. tit. "Man." (L.), n. See infra, "Invalidating Return."

ousted, yet the return would be literally true.(*k*) So a return by a mayor, which stated "that he called to him thirty of the council in domo concilii assemblati, and removed the prosecutor," had been held insufficient, because it did not appear that such removal was "apud commune concilium."(*l*) So a return which alleged "quod procuraverunt eum summoneri" has been held insufficient, for such an allegation is not direct as to the summoning.(*m*) So where a return stated "that the prosecutor was heard de aliis criminibus ei objectis," without saying what, before whom, or in what place, has been held to be bad.(*n*) So an allegation that the prosecutor was auditus in communi concilio, without saying by whom, &c. is also bad.(*o*) So to a writ which commanded the defendant to take upon himself the office of common councilman of a borough, a return that "by a bye-law persons refusing to fill that office are subject to a certain fine, and that the defendant had paid the fine," has been held to be insufficient, as it did not state that the fine was to be in lieu of service.(*p*) So an averment that "the prosecutor did not account for money to the corporation," without saying that he was requested and refused(*p*) is insufficient; for when a request is necessary to a defence, it should be alleged in the return.(*q*) The Court of B. R. has also decided that a return was insufficient which merely stated "that the prosecutor did not take the oath required by stat. 13 Car. 2, before the mayor," without alleging "or before justices of the peace," who by the same statute have also authority to administer it.(*r*) So where by a return, a custom to remove from an office, ad libitum, was alleged by way of recital, and not positively that there was such a custom, such a return was held to be bad.(*s*) So a return of "non sibi constat," that there is any *such custom, has been held to be bad, because it was neither positive [*356] nor certain.(*t*) So a return of "non constat nobis that he was even elected," has been also held to be bad for the same reason.(*u*) But a return modo et formâ sequenti is well enough.(*v*)

(*k*) R. v. Clapham, 1 Vent. 111. S. C. 1 Lev. 306. S. C. 2 Keb. 742. S. C. Fitzg. 194. Com. Dig. tit. "Man." D. 5. Bac. Abr. tit. "Man." (1.)

(*l*) Mayor of Gloucester's case, 3 Bulst. 189. S. C. 1 Roll. 409. R. v. Wilton (Mayor), 5 Mod. 258. R. v. Glide, 12 Mod. 29. R. v. Liverpool (Mayor), Burr. 732. R. v. Taylor, 2 Salk. 451.

(*m*) See ante, p. 203, n. (*w*). Braithwaite's case, 1 Vent. 19. Com. Dig. tit. "Man." D. 5.

(*n*) See ante, p. 203, n. (*u*). R. v. Wilton (Mayor), 5 Mod. 258. S. C. Ld. Raym. 225. R. v. Glide, 12 Mod. 29. Com. Dig. tit. "Man." D. 5.

(*o*) R. v. Bower, 1 B. & C. 585.† S. C. 2 D. & R. 842.† Bac. Abr. tit. "Man." (1.).

(*p*) R. v. Wilton (Mayor), 5 Mod. 259. See "Demand and Refusal," p. 282—287. Com. Dig. tit. "Man." D. 5.

(*q*) R. v. Wilton (Mayor), 5 Mod. 259. S. C. 2 Salk. 428.

(*r*) R. v. Slatford, 5 Mod. 318. S. C. 2 Salk. 429. S. C. Burr. 1452. S. C. Holt, 438. Com. Dig. tit. "Man." D. 5.

(*s*) R. v. Coventry (Mayor), Salk. 430. S. C. Ld. Raym. 391. S. C. Holt, 438. Com. Dig. tit. "Man." D. 5.

(*t*) Anon., 1 Vent. 267. Andrews v. Lakin, Noy, 139. Com. Dig. tit. "Man." D. 5.

(*u*) Recorder of Barnstable's case, P. 18 Car. 2. Raym. 153, cited in Manaton's case, Raym. 365. Bac. Abr. tit. "Man." (1.).

(*v*) Pullen v. Palmer, Ld. Raym. 496.

The Court of B. R. has also held a return to a mandamus to restore common councilmen to their office, "that they were chosen yearly, and that before the coming of the writ they were chosen and continued for a *year*, and at the end of the year were duly moved from their offices by the election of others, to be bad for its uncertainty, for it ought to have shewn the time they were elected or removed, so that it might have appeared they were not removed before the year expired.(w) So to a mandamus to restore to the office of capital burgess a return which stated the ground of the disfranchisement to have been non-attendance of the prosecutor at a meeting, to which he was summoned, for the election of a capital burgess, and an averment that the right of such election was in the capital burgesses, being the common council, has been held not to assert with sufficient certainty that the prosecutor should have concurred in the election, and ought to have obeyed the summons, because consistently with such an averment he might not have had that right, as it did not appear by the return that all the capital burgesses were members of the common council.(x) So a return which stated that a certain meeting "was not duly assembled," without showing in what particular the assembly was not a due one, it being by the return admitted that it was duly assembled for some other purpose, has been held to be too vague and uncertain.(y) So a return which admitted the prosecutor's qualification thus, "that there were five Court days, at which persons should have been admitted, that the prosecutor had notice, and did not appear, and therefore could not be admitted," has been held to be bad, because it did not set forth that he could not have been admitted at any other than on those five days.(z)

As every allegation of a return must be direct, and be stated in the most unqualified manner, it follows, that in accordance with the rules of pleading, although they do not in terms apply to the pleadings of [*357] a mandamus, that a return which denies the matters of the writ with a protestando, is ill. There is no instance in which a protestando can be adopted in a return.(a)

The business of pleading being to set forth facts, and not to draw inferences of law,(b) it follows, that the facts, the subject-matter of a return, must not be stated either *inferentially* or *argumentatively*, but with certainty and plainness.(c) The defect of argumentativeness is held

(w) *R. v. Chester (City)*, 5 Mod. 10. S. C. Comb. 307. S. C. 3 Salk. 230. S. C. Holt, 438. *White's case*, 6 Mod. 18; Com. Dig. tit. "Man." D. 5.

(x) *R. v. Lyme Regis (Mayor)*, 1 Doug. 177. Com. Dig. tit. "Man." D. 3. And see *R. v. Monmouth (Mayor)*, 4 B. & C. 496.† Bac. Abr. tit. "Man." (I.)

(y) *R. v. York (Mayor)*, 5 T. R. 69, 74. See ante, 355.

(z) *R. v. Whiskin*, Andr. 1; Com. Dig. tit. "Man." D. 4.

(a) *R. v. Bristol Dock*, 9 D. & R. 309.† S. C. 6 B. & C. 181.† *R. v. Luton Roads*, 1 G. & D. 250. S. C. 1 Q. B. 860.† See Reg. G., H., 4 Wm. 4. r. 12.

(b) Ante, p. 309, n. (k), *R. v. Lyme Regis (Mayor)*, 1 Doug. 155. See Steph. on Pl. 207, 403, 422, 5th edit.

(c) *R. v. Lyme Regis (Mayor)*, 1 Doug. 179; Stra. 115. *R. v. Hereford (Mayor)*, 6 Mod. 309. *R. v. Stevens*, cited in 1 Doug. 179. *R. v. Richardson*, Burr. 517. *R. v. London (Mayor)*, 4 Doug. 360, 382.† *R. v. Abingdon (Mayor)*, Id. Raym. 559.

to be fatal to a return to a writ of mandamus, because, by its uncertainty, it bars the prosecutor of his action for a false return. Thus, a return that "no Sacrament was taken before election, per quod electio vacua et non sunt capitales burgenses," has been held to be bad, as being mere inference from the premises.(d) So, a return which stated, "that upon an election, B. had eighteen voices, and the prosecutor but seventeen, and that B. had been sworn in," has been held to be defective for argumentativeness, and that it should have expressly alleged that "the prosecutor was not chosen."(e) So, a return which stated that "another was elected mayor before the writ delivered, and adhuc est major," without saying "debito modo electus,"(f) and also, a return, "quod servivit et journeyman potius quam servus," have been held to be argumentative and bad.(g)

If by reason of the uncertainty of a return, the prosecutor cannot *plead to it, the Court will, either on motion or demurrer, quash it for such defect,(h) and award a peremptory writ of mandamus.(i) [*358]

The rule of pleading, that "*matter of law need not be averred*,"(j) governs likewise a return to a writ of mandamus; for it has been decided, that if to a given statement of facts, there be annexed a legal presumption, the facts, and not the presumption, should be stated. Thus it has been held to be unnecessary to aver in a return to a mandamus to restore, &c., that a power of amotion is vested in the corporate body at large; because such a power is incidental to them, unless given by charter, by-law, &c., to a select part thereof.(k)

It has been held, that in a return to a mandamus, the averment of profert is never made, because as such return was at the time of the deci-

S. C. 2 Salk. 432. R. v. Kendall, 4 P. & D. 616. S. C. 1 Q. B. 366.† R. v. Chapman, 6 Mod. 152.

(d) R. v. Abingdon (Mayor), Ld. Raym. 559. S. C. 2 Salk. 432. Com. Dig. tit. "Man." D. 5.

(e) R. v. Hereford, 6 Mod. 309. S. C. 2 Salk. 701. S. C. 1 Sid. 209. S. C. 1 Keb. 660, 716. R. v. Thame (Guardians), Stra. 115. Jones's case, 2 Jon. 177, 178. R. v. Raines, 3 Salk. 232, 11. R. v. Lyme Regis (Mayor), 1 Doug. 181; Ld. Raym. 225, 559. R. v. Doncaster, Burr. 738. R. v. York (Mayor), 5 T. R. 66, 73, 74. R. v. Ilchester (Bailiffs), 4 D. & R. 330.† S. C. 2 D. & R. 724.† S. C. 2 B. & C. 764.† Com. Dig. tit. "Man." D. 5. See R. v. Kendall, 1 Q. B. 366.† S. C. 4 P. & D. 603.

(f) Manaton's case, Ray. 365. Com. Dig. tit. "Man." D. 3.

(g) Townsend's case, Raym. 92; Com. Dig. tit. "Man." D. 5. In R. v. Kendall, 4 P. & D. 603. S. C. 1 Q. B. 366.† S. C. 10 L. J., N. S. 137, Q. B., the Court said it was not prepared to hold that a return is necessarily bad for the defect of argumentativeness, if the facts are fully set forth in order to convince the Court in point of law that the right as claimed does not exist. And see R. v. London (Mayor), 16 L. J., N. S. 185, Q. B.

(h) See ante, p. 353, n. (w) R. v. West Riding (J.), 3 M. & S. 494. Bagg's case, 11 Rep. 99 b. R. v. Sterling, Say. 174. See post, tit. "Invalidating return."

(i) Townsend's case, Raym. 93. See tit. "Peremptory Writ."

(j) See Steph. on Pl. 467, 468, 5th edit. See ante, p. 351.

(k) Ante, p. 199, n. (s). R. v. Lyme Regis (Mayor), 1 Doug. 149, 158. R. v. Liverpool (Mayor), Burr. 731.

sion conclusive upon the prosecutor, he could neither have oyer, nor plead a plea.(l)

—.] *Substance*.—A special return must be good in substance,(m) otherwise it may be successfully objected to and quashed, either on motion or demurrer;(n) and a peremptory writ awarded.

Every good legal cause why the prosecutor is not entitled to the writ, whether it arise from his personal incapacity to sue it out and prosecute it, as on account of outlawry, &c.,(o) or by reason of the absence of a legal right to that which he seeks, will alike form a good and valid return thereto.(oo)

The return will be bad, if it shew the legal liability of the defendant, or do not sufficiently answer the mandatory clause of the writ.(p) Thus, to a mandamus, the effect of which is to ascertain whether a discretion may or not have been honestly exercised, it is not sufficient to return that "what has been *deemed* necessary, has been done;" for it should [*359] *state what has been done, and also expressly allege that no more was necessary, in order that a traverse may be taken which otherwise is impossible.(q) Nor is a return sufficient, if it merely aver matter of fact, which the prosecutor may be able to falsify in an action on the case for a false return; because such matter should be so particularly alleged, that the Court may also be able to judge of it, and determine whether it be sufficient or not.(r) In some of the older cases, however, a general return has been held to be sufficient, but on examination it will be found, that such returns were fortified by something of credit. Thus, a return which merely stated "that the prosecutor had been convicted of *enormous crimes*," they not being particularly alleged, has been held insufficient; but it appeared that the visitor had given sentence, which could not have been if the writ had been prayed before sentence.(s)

A return which shews a legal impossibility to perform what the writ commands, is good;(t) such impossibility cannot, however, be shewn by

(l) Anon., 12 Mod. 232. *Jenning's case*, 5 Mod. 423, 521.

(m) *London (City) v. Estwick*, Sty. 32. *Braithwaite's case*, 1 Vent. 19.

(n) *R. v. Liverpool (Mayor)*, Burr. 723, approved in 2 T. R. 181. *R. v. Tappenden*, 3 East, 188; 8 T. R. 353. *R. v. Prin*, 1 Keb. 594, 595, 686. See post, "Invalidating Return."

(o) Ante, p. 288, n. (k). *R. v. Bristol (Mayor)*, 1 Show. 288. S. C. nom. *R. v. Rowe*, Carth. 199. S. C. Comb. 145. Com. Dig. tit. "Man." (B.)

(oo) Ante, p. 27, 28, 293, 294.

(p) See ante, p. 194, 195, n. (e), (f). *R. v. Bristol Dock*, 2 Q. B. 64.† S. C. 1 G. & D. 286. S. C. 2 Rail. Cas. 599. *R. v. Buckingham (Corp.)*, 10 Mod. 179. See tits. "Peremptory Writ," "Quashing Return."

(q) Ante p. 309, n. (i), 319, n. (r), 357, 358. *R. v. Ouse Bank Commissioners*, 3 A. & E. 544, 549.

(r) Ante p. 319, n. (r). *R. v. Abingdon (Mayor)*, 2 Salk. 432, per Holt, C. J. S. C. Ld. Raym. 559. *R. v. St. Andrew (Parish)*, 10 A. & E. 739.† *R. v. Liverpool (Mayor)*, Burr. 723, approved in T. R. 181.

(s) See ante, p. 198 199. *Appleford's case*, 1 Mod. 82. S. C. 2 Keb. 299, 861. *R. v. St. John's*, 4 Mod. 368.

(t) See ante, p. 121, n. (r). *R. v. Round*, 4 A. & E. 139.† S. C. 5 N. & M. 427.† S. C. 1 H. & W. 546.

averring facts inconsistent with the original duty, but by denying the suggestion in the writ, upon which alone the duty could be founded at the time when the writ issued.(u) The want of necessary or sufficient funds to execute or carry out the commands of a writ of mandamus, is therefore in general no answer to it. Thus, where the trustees of a turnpike road had formed a new road through private grounds, but had neglected to make proper fences, as required by stat. 4 Geo. 4, c. 95, s. 66, the want of necessary funds for that purpose was held not to constitute a valid return;(v) and this is also true, though the duty which the defendants have to discharge, be a public one, if it do not appear on return why they are without funds, or how they have disposed of them.(w)

If, however, the return attempt to shew an incapacity to obey the *writ, by reason of the change of circumstances, the return must shew that there was no fraud or stratagem on the part of the de-^[*360] fendant.(x)

—.] —. *Double or Several Returns.*—The rule of law as to a return consisting of two or more causes is, that “wherever there is a mandamus directed to a party to do some act, or to return some cause to the contrary, it is competent to that person to return as many causes to the whole of the writ, or to distinct portions of it, as he pleases, provided they are not inconsistent with each other; and that if one of them only be sufficient no peremptory mandamus will be awarded, for utile per inutile non vitiatur.”(y) Therefore, in order to support a return consisting of several returns, it is not necessary that every one of them should be good but it is sufficient if one be good, provided the whole of them are neither repugnant nor inconsistent.(z) So that if the return consist of several independent matters not inconsistent with each other, but part of them are good in law, and part bad, the Court may, and will quash the return

(u) See ante, p. 109, n. (r), 224, n. (m), (n). R. v. Eastern Counties Railway, 10 A. & E. 531, 557, 561.† S. C. 4 P. & D. 48. S. C. 1 Rail. Cas. 509, cited in R. v. Birmingham Railway, 2 Q. B. 58.† S. C. 1 G. & D. 324.

(v) See ante, p. 109, n. (r), 131, n. (p) 224, n. (m), (n). R. v. Luton Roads, (Trustees), 1 Q. B. 860.† S. C. 1 G. & D. 248. See tit. “Courts Inferior” (Holding.)

(w) 1 G. & D. 247, per Ld. Denman, C. J., supra, n. (v). R. v. Eastern Counties Railway, 4 P. & D. 46. S. C. 10 A. & E. 531, 557.† n. (b). S. C. 1 Rail. Cas. 509. See ante, tit. “Railway” (Duties, &c., Return).

(x) Willock on Corporations, 406. And see R. v. Payn, 6 A. & E. 405.†

(y) Bull. N. P. 201. Bac. Abr. tit. “Man.” (I.) R. v. London (Mayor), 3 B. & Ad. 271.† S. C. 2 N. & M. 130; † 1 N. & M. 285.† Wright v. Fawcett, Burr. 2041; Cowp. 413. Green v. Durham (Mayor), Burr. 127. Ward v. Newcastle (Mayor), cited in Burr. 2044, per Yates, J. R. v. Norwich (Mayor), Ld. Raym. 1244. S. C. Holt, 444. S. C. 2 Salk. 436, n. (a). R. v. York (Mayor), 5 T. R. 67, 68, where see form of several returns. R. v. Old Hall (Manor),¹⁰ A. & E. 248.† S. C. 2 P. & D. 518. R. v. North Midland Railway, 11 A. & E. 955.† S. C. 3 P. & D. 622. S. C. W. W. & D. 650. Com. Dig. tit. “Man.” D. 3. R. v. New Windsor (Mayor), 7 Q. B. 917.† S. C. 14 L. J., N. S. 319, Q. B.

(z) R. v. York (Archbp.), 6 T. R. 493, cited in R. v. Kendall, 4 P. & D. 618. S. C. 1 Q. B. 366.† R. v. Brancaster (Churchwardens), 7 A. & E. 459.† S. C. 2 N. & P. 580.

as to such part only as is bad, and in its discretion put the prosecutor to plead to or traverse the rest.(a)

The following matters of return have been allowed to be returned together, as not being either inconsistent or repugnant. Thus there is neither inconsistency nor repugnance in stating first, "non debito modo electus," and secondly, "that a tribunal authorized to decide upon the election, had adjudged such election to be void."(b) So where the right of election of an alderman is, by custom, in the citizens, but the Court of Aldermen has the power of rejecting the party returned to them as elected, it is not inconsistent to return to a mandamus to admit to the office of alderman, that the prosecutor "was elected by the [*361] *citizens according to the custom, but was rejected by the Court of Aldermen, and so was not duly elected."(c) So to a mandamus to be sworn and admitted into the office of freeman, returns that "the prosecutor was not elected," and "that he was not approved by the lord of the manor," have been held to be consistent.(d) So returns that "the prosecutor was not duly elected sexton according to the ancient custom of the parish," and also, "that there was a custom for the churchwardens and inhabitants to remove at pleasure, and that the prosecutor was removed pursuant to such custom," have been held to be consistent.(e) So to a mandamus to the lord of a manor to hear a plaint, a return "that in 1835 the plaint was set aside and annulled for certain errors, and that afterwards, in 1838, in obedience to the writ, the defendants heard the plaint again, when for the same errors, and for others, it was adjudged that the plaint had been rightly set aside in 1835, so that they could not take further cognizance of the plaint," has been held not to be repugnant; because they stated both that the plaint had been proceeded with in obedience to the writ, and that it could not be so proceeded with.(f) So returns "that A. was not a burgess," "that he was not eligible to the office of common councilman," and "that he was not elected," have been held not to be inconsistent causes to a writ to admit to the office of common councilman.(g)

As before stated,(h) the inconsistency or repugnance of returns is a

(a) *R. v. Cambridge (Mayor)*, 2 T. R. 456, 461. *R. v. London (Mayor)*, 4 M. & R. 53. *R. v. London (Mayor)*, 9 B. & C. 1, 20.† *R. v. York (Mayor)*, 5 T. R. 66; Com. Dig. tit. "Man." D. 3, 5; Vin. Abr. tit. "Man." R.; Bac. Abr. tit. "Man." (I). *R. v. York (Archbp.)*, 6 T. R. 493. See post, tit. "Pleas," &c.

(b) *R. v. London (Mayor)*, 9 B. & C. 26.† S. C. 4 M. & R. 36, 59. *R. v. London (Mayor)* 5 B. & Ad. 233, 241.† *R. London (Mayor)*, 2 N. & M. 126, 130. See ante, tit. "Office" (Election).

(c) *R. v. London (Mayor)*, 2 N. & M. 126,† where see a form of return.

(d) *Wright v. Fawcett*, Burr. 2041. *R. v. York (Mayor)*, 5 T. R. 71. *R. v. Norwich (Mayor)*, 2 Salk. 436, n. (a).

(e) See ante, p. 258, n. (a). *R. v. York (Mayor)*, 5 T. R. 71. *R. v. Taunton (Churchwdns.)*, Cowp. 413. *Wright v. Fawcett*, Burr. 2040; 2 Salk. 436, n. (a). Com. Dig. tit. "Man." D. 3.

(f) *R. v. Old Hall (Manor)*, 2 P. & D. 515. S. C. 10 A. & E. 256.†

(g) See ante, p. 100, n. (m). *R. v. Cambridge (Mayor)*, 2 T. R. 456, where see form of return. Com. Dig. tit. "Man." D. 3.

(h) See ante, p. 360, n. (y), (z).

fatal defect ;(*i*) for as on a declaration, in which two inconsistent counts are joined, the plaintiff cannot have judgment :(*j*) so on a mandamus where the causes returned are either inconsistent or repugnant, the whole return is bad, and the Court will, on motion, quash it, and award a peremptory writ, (*k*), and so put the defendant, in the case of an *office, to [*362] bring a quo warranto :(*l*) notwithstanding one of the inconsistent causes would have been good, if it had been returned by itself; for by being connected with another, it is made repugnant and contradictory, which raises an objection to the whole return, for the Court cannot know upon which part of it to rely. (*m*).

The following matters of return have been adjudged to be inconsistent and repugnant, and the returns in which they were joined have been quashed. Thus a return "that D. was elected," which ended by stating "that he was not elected," was quashed for inconsistency, as it was impossible to reconcile those statements. (*n*) So a return "that the prosecutor was duly elected," "that he was removed for non-attendance," and "that his election was void, he not having taken the Sacrament," has been quashed for repugnancy. (*o*) So it has been held to be inconsistent to state in a return "that the corporation were not duly assembled on the 15th January," and afterwards to state "the election of another corporate officer, *to wit, on the 15th January*," the day, in such case, being material. (*p*) So the joinder of several inconsistent matters of returns, as misbehaviour, bribery, and not elected, (*q*) have invalidated a return.

If, however, the inconsistency or repugnancy be in matter of mere surplusage, the return will not thereby be vitiated. (*r*) Thus, if in one part, a return be "*quod fuit amotus 21 Aug.*," and in another part "that he

(*i*) *R. v. London (Mayor)*, 9 B. & C. 1.† *S. C.* 4 M. & R. 36. *R. v. Norwich (Mayor)*, *Ld. Raym.* 1244. *S. C.* 1 Salk. 436. *S. C.* Holt, 444. *R. v. Old Hall (Mayor)*, 2 P. & D. 517. *S. C.* 10 A. & E. 256.† As to what is a sufficient allegation of an inconsistent fact to avoid return, see 2 T. R. 460, 461.

(*j*) 2 T. R. 461, per Buller, J.

(*k*) *R. v. Cambridge (Mayor)* 2 T. R. 456, 461. *R. v. London (Mayor)*, 4 M. & R. 53. *R. v. York (Mayor)*, 5 T. R. 66. *Vid. Com. Dig. tit. "Man."* D. 3, 5; *Vin. Abr. tit. "Man."* R.; *Bac. Abr. tit. "Man."* (I.) On the motion, objections may be taken to the several causes for inconsistency, and to the causes individually for other defects; 5 T. R. 66, *supra*.

(*l*) *Wright v. Fawcett*, *Burr.* 2041. *R. v. Cambridge (Mayor)*, 2 T. R. 459.

(*m*) *R. v. Cambridge (Mayor)*, 2 T. R. 456; *Ld. Raym.* 1244. *S. C.* 2 Salk. 436. *R. v. York (Mayor)*, 5 T. R. 66. *R. v. Taunton (Churchwardens)*, *Cowp.* 413. *Wright v. Fawcett*, *Burr.* 2041. *R. v. Lyme Regis (Mayor)*, 1 Doug. 181, n. F. *Com. Dig. tit. "Man."* D. 3.

(*n*) *R. v. Norwich (Mayor)*, 2 Salk. 436, 17. *S. C.* *Ld. Raym.* 1244. *S. C.* Holt, 444. *R. v. London (Mayor)*, 9 B. & C. 20.† *S. C.* 4 M. & R. 36, 59. See 2 T. R. 459, *supra*, n. (*m*).

(*o*) *R. v. Pomfret (Mayor)*, 10 Mod. 107. See *ante*, p. 55, n. (*g*).

(*p*) *R. v. York (Mayor)*, 5 T. R. 66.

(*q*) 2 Salk. 436. *S. C.* *Ld. Raym.* 1244. *S. C.* Holt, 444, *supra*, n. (*n*). *Com. Dig. tit. "Man."* D. 5. *R. v. Kendall*, 4 P. & D. 616. *S. C.* 1 Q. B. 366.† And see 5 T. R. 66, and 4 D. & R. 330.† *S. C.* 2 B. & C. 764.†

(*r*) *Ld. Hawley's case*, 1 Vent. 144. *S. C.* 2 Keb. 770, 796. *R. v. Coventry (Mayor)*, 2 Salk. 430. *S. C.* *Ld. Raym.* 391. *Bernardston's case*, 1 Vent. 145. *R. v. Durham (Corp.)*, 10 Mod. 146.

continued in office until the 25th December," which is contradictory, yet the return is good, because the contradiction exists; in that which is mere surplusage.(s)

—.] 3rd. *Return in nature of a Demurrer to the Writ.*—As the defendant cannot demur to the writ, so he may, by his return, submit that he is not bound by law to execute it, which submission being in the [*363] *nature of a demurrer, should be treated accordingly; that is, a concilium obtained, and the point argued.(t)

—.] *Engrossing.*—The draft return having been obtained from counsel carefully drawn and settled, should be engrossed by the defendant's attorney on parchment for filing. If the return be short, it may be engrossed on the back of the writ, or a copy, as the case may be, in the same manner as a return of "non est inventus," in the ordinary case of a writ of execution; or it may, according to the almost invariable practice, especially if the return be of any length, be engrossed upon a separate parchment, to which the writ or copy, as the case may be,(u) should be annexed, it having been endorsed with a minute or memorandum, that the schedule or parchment annexed to such writ, constitutes and is the return.(v) The form of the indorsement may be as follows: "*The execution of this writ appears by the Schedule hereto annexed. The answer of A. B., &c., &c.*"

—.] *Signing and Sealing.*—When the return is engrossed, it is usual, if it be made by a private person, or corporation sole, to sign his name at the foot of it, although it seems that in principle, such signature is not necessary, for when the return is filed, it becomes a record, and cannot be averred against, and the parties in whose names it is made, are thereby estopped from saying it is not their return; but if any other illegally have made it, an action on the case lies against him for having so done.(w) It has, however, been held in one case, that where the writ is directed to a person by his personal name, and not by his official one, he, in such case, should sign it, or show by indorsement or otherwise, that it is his return. Thus where a writ of mandamus was directed, "*Johanni Goar Præsidi, Sociis et Scholaribus, &c. Seti. Johannis Baptistæ.*" It was held, that although the common seal was not necessary to such a return, yet as it was particularly directed to "*John Goar,*" he should have signed it; but it was also held, that the indorsement thereon of the name

(s) Com. Dig. tit. "Man." D. 3; 1 Vent. 144. S. C. 2 Keb. 770, supra, n. (r).

(t) R. v. St. Pancras (Trustees), 6 A. & E. 316.† S. C. 1 N. & P. 507,† where see form of return. R. v. Williams, 8 B. & C. 683.† S. C. 3 M. & R. 405, and cases there cited. See tit. "Demurrer," post. R. v. St. Saviour's Parish, 7 A. & E. 925.† S. C. 3 N. & P. 26. S. C. 1 N. & P. 496,† where also see a form of such a return. See post, tit. "Immediate Returns."

(u) See ante, p. 330, n. (k), 331, n. (q).

(v) Gude's Cr. Pr. 184.

(w) Ante, p. 342, n. (o), n. (p). R. v. St. John's Coll., Skin. 368. R. v. Wigan (Mayor), Burr. 1645. See tit. "Action and Information for False Return."

of the person making it thus: "Resposio Johannis Goar," &c. (according to the direction of the writ,) was sufficient.(*x*)

*Where the return is that of a corporate body it is clearly settled, that it need be neither signed, nor under the common seal, [364] for the reason above stated, that as the filing makes it a record, it is good without, and cannot be averred against.(*y*) The precedents of the returns of municipal corporations are diverse, although the greater part of them are under the hand and seal of the mayor only;(z) the name being merely that of the office, and not the Christian or surname of the officer.(*u*) As a municipal corporation, in whose name the return is made, is estopped from disavowing it, although made by the mayor alone, so an action, if the return be false, may be brought against either the whole body or the person who procured it.(*b*) The mayor, &c., is also liable to such action for a false return, in his private capacity, and evidence that the writ was delivered to him, and that there is a return made,(*c*) is sufficient to support it.

—.] *Swearing to Return*.—Previously to the passing of stat. 9 Ann. c. 20, it was usual, in many cases for the Court to require that the writ should be returned upon oath, and on default, to grant a peremptory writ;(d) but as by that statute the prosecutor may traverse the return, and is not, therefore, driven to his action, or information, for a false return; so, since the passing of such statute, the uniform practice has been, that such return need not be sworn,(e) unless the Court, by order, so direct;(f) which it will not do as of course,(g) or upon the assertion [365] *by the prosecutor that it is false;(h) but if the Court itself suspects it to be false, it will, in its discretion, order it to be sworn to.(i)

(*x*) R. v. St. John's Coll., Skin. 368. See ante, 317, n. (*w*).

(*y*) Powell v. Price, Comb. 41, citing Bagg's case, 11 Rep. 93 b. R. v. Gloucester (Mayor), 2 Show. 504. Lidleston v. Exeter (Mayor), Comb. 422. S. C. 12 Mod. 126. S. C. Ld. Raym. 223. R. v. Challice, Ld. Raym. 848, S. P. R. v. Exeter (Mayor), Ld. Raym. 223. R. v. St. John's Coll., Comb. 279. Thetford's case, 1 Salk. 192, 4. S. C. Holt, 171. S. C. 3 Salk. 103, 4; and see Skin. 368, and Burr. 1644, supra; 1 Leon. 184. Arundel v. Arundel, Yelv. 34; Com. Dig. tit. "Man." D. 2. R. v. Abingdon (Borough), 12 Mod. 308, 401; but see Morgan v. Carmarthen (Corp.), 3 Keb. 350. See form of return by City of London, 2 N. & M. 126; ‡ Bull. N. P. 205; Bac. Abr. tit. "Man." (L.) Gude's Cr. Pr. 184.

Before the Statute of York sheriffs were not required to set their hands to returns.

(*z*) Powell v. Price, Comb. 41. Thetford's case, 1 Salk. 192, 4. S. C. 3 Salk. 103, 4. S. C. Ld. Raym. 848. S. C. Holt, 171.

(*u*) R. v. Colchester (Mayor), Comb. 324. See ante, p. 317, n. (*w*).

(*b*) Ante, p. 341, n. (*j*), 342, n. (*o*); 12 Mod. 126, supra, n. (*y*).

(*c*) Ante, p. 342 (*p*), 344, (*b*); 1 Salk. 192, 4. S. C. 3 Salk. 103, 4; Skin. 368. See post, tit. "Action and Information for False Return."

(*d*) Jay's case, 3 Keb. 714. S. C. 1 Vent. 302, per Hale, C. J., citing Medicott's case, Manaton's case, Raym. 365; Com. Dig. tit. "Man." D. 2.

(*e*) Anon., 1 Sid. 257; Com. Dig. tit. "Man." (D. 2).

(*f*) R. v. Oxford (Mayor), Palmer, 455. S. C. Latch. 229. S. C. Noy, 92, citing Mayor of Coventry's case, also cited in Awdley's case, Latch. 124. S. C. Poph. 176. S. C. Noy, 98.

(*g*) Burgess of Devises' case, 2 Keb. 725. Awdley's case, Latch. 124, pl. 117.

(*h*) Anon., 1 Sid. 257, although a precedent, Latch. 123, was quoted.

(*i*) Manaton's case, Raym. 365, 366.

—.] *Filing Return; Necessity of Filing.*—The return, when engrossed and completed,(j) must be taken, together with the writ, to the Crown Office,(k) and be there filed;(l) for until it is so filed, it is not, in law, a return.(ll)

In general every return is ambulatory, and in the breast of him or them whose return it is, until it shall be filed;(m) but after it is filed, it becomes a record, and cannot be altered nor amended, without a rule of Court for that purpose having been previously obtained, which the Court is very disinclined to grant;(n) notwithstanding the application be made during the same Term in which the return came in, for although the acts of the Court remain in the breast of the Court, during the same Term, yet such rule does not apply to returns which are the acts of others.(o)

—.] *When to be Filed.*—The return should, unless time for that purpose have been previously obtained,(p) be filed according to the exigency of the writ, that is, on or before the return day thereof;(q) or if further time have been obtained,(r) then on or before its expiration. But it seems that a return cannot regularly be filed after the death of him whose return it is; if so, such proceeding is irregular,(s) for as before stated, until a return is filed, it is ambulatory, although signed, for that is neither necessary nor material; so that if a defendant should die immediately after signing a return, and before filing it, the Court would, if necessary, direct an issue to try the validity of it.(t)

If the return be not duly filed, either on or before the return day of the writ, or on or before such other further day as the Court may have [*366] allowed;(u) an attachment may be obtained for the contempt of *Court in not obeying the writ or rule, as the case may be,(v) and this appears to be the only remedy the prosecutor has, inasmuch as the mere fact of the return having been filed too late is not a ground for quashing it, for when once on the file, the Court will allow it to stand.(w)

The Court has in various instances imposed fines upon defendants who

(j) Crown Off. Rules, r. 11, App. Gude's Cr. Pr. 184. See ante, p. 331, 334, 345, n. (k), as to filing the writ.

(k) King's Bench Walk, Temple. R. v. Hoskins, Cas. temp. Hard. 188.

(l) R. v. Abingdon (Mayor), 2 Salk. 431, 9. S. C. Holt, 440. S. C. Carth. 500.

(ll) R. v. Wigan (Mayor), Burr. 1641, 1646. See supra, n. (j).

(m) R. v. Holmes, Burr. 1644, per Wilmot, J. See supra, n. (ll).

(n) London (City) v. Estwick, Styles, 33, 35, and per Roll (J.) No record was ever amended after filing before the time of Hen. 7.

(o) Sty. 33, 35, supra, n. (n). (p) Ante, p. 6, 344, n. (c), (d), (f).

(q) Ante, p. 6, 344, n. (g). Cr. Off. R. r. 11, App.

(r) Ante, p. 344, n. (f).

(s) R. v. Holmes, Burr. 1641; Com. Dig. tit. "Man." D. 2.

(t) R. v. Wigan (Mayor), Burr. 1641-1646, supra, n. (m).

(u) Ante, p. 6, n. (o), 344, n. (f).

(v) Ante, p. 6, n. (o), 344, n. (f). See post, tit. "Attachment."

(w) R. v. Kendall, 1 Q. B. 374,† S. C. 4 P. & D. 603. S. C. 10 L. J., N. S. 137, Q. B.

have improperly delayed filing their returns. Thus, because a college had delayed and trifled with the Court of B. R., by contemptuously neglecting to make a return, such Court granted an alias writ, returnable within a week, under a penalty of 100*l.*(*x*) So the Court has fined a mayor 5*l.* for contemptuously refusing to make a return, and likewise granted an attachment against him.(*y*) A bishop of Durham was also, temp. Edw. 3, fined 2000*l.* for the same cause.(*z*)

—.] *How filed*.—Formerly, in order to file a return, it was necessary by motion to obtain a rule of Court for leave so to do,(*a*) but now such motion is unnecessary by reason of Rule 14 of the Crown Office Rules, which states that it shall not thenceforth be necessary to make any motion to file any writ or other proceeding returned into the Court of B. R., but that the same shall be filed at the Crown Office, without any rule having been first granted for that purpose. It is therefore only necessary to take it to the Crown Office, and leave it with the proper officer there.(*b*)

—.] *Staying filing*.—Formerly, when the consent of the Court to file a return was necessary, it was the practice for the prosecutor, or of those who of right should have joined in the return, if he or they had grounds for such an application, to apply to the Court on motion to stay the filing thereof;(c) but, it is apprehended, that as the filing is now a matter of course without rule,(*d*) and as the prosecutor may, for just cause, obtain a rule to take the return off the file,(*e*) such motion and practice has become obsolete.

*—.] *Taking off File*.—The Court has the power to and [*367] will, if a return be improperly on the file, upon motion for that purpose made, order it to be taken off the file, which is tantamount to quashing it;(f) such power is, however, sparingly exercised. Thus where a return was scandalous, the Court would not allow it to be taken off the file, even with consent, but, under the special circumstances of the case, allowed the return to be dashed through in the manner of a cancellation.(*g*) So the Court has refused to order a return to be taken off the

(*x*) Dr. Witherington's case, 1 Keb. 50. S. C. 1 Lev. 23. S. C. 1 Sid. 71.

(*y*) R. v. Oxford (Mayor), Latch. 229. S. C. Palm. 455.

(*z*) Anon., 1 Keb. 101.

(*a*) R. v. Abingdon (Mayor), 2 Salk. 431, 9; Burr. 1641. Dr. Witherington's case, 1 Keb. 79. London (City) v. Estwick, Sty. 33; Comb. 289.

(*b*) See Cr. Off. R., App. r. 14. See ante, p. 344, n. (*g*), 365, n. (*k*).

(*c*) Bull. N. P. 205. R. v. Abingdon (Mayor), Carth. 500. S. C. 2 Salk. 431, 9. S. C. 12 Mod. 308. S. C. Holt, 440. S. C. Ld. Raym. 559.

(*d*) See supra, n. (*b*); Cr. Off. R. r. 14. "It shall not henceforth be necessary to make any motion to file any writ or other proceeding returned into the said Court, but the same shall be filed at the Crown Office, without any rule first granted for that purpose."

(*e*) See ante, p. 365, and infra, p. 367, n. (*f*), (*g*), (*h*).

(*f*) R. v. Holmes, Burr. 1641. R. v. Payn, 6 A. & E. 403.† S. C. 1 N. & P. 524.† R. v. Payn, 3 P. & D. 625. S. C. 11 A. & E. 955.† R. v. Poole (Mayor), 9 L. J., N. S. 231, Q. B.

(*g*) Dr. Widdrington's case, Raym. 68, 69. S. C. 1 Keb. 458. Dr. Patrick's case, 1 Lev. 67; but see R. v. Barker, Burr. 1379, 1389. S. C. 1 W. Blac. 300, 352,

files of the Court on account, as disclosed by affidavits, of it being a contempt of Court.(h)

——.] *Withdrawing Return*.—A return to a mandamus may, it seems, be withdrawn by leave of the Court.(i)

——.] *Disavowing Return*.—In many cases it occurs that the return of one, or of a majority, is in law deemed to be the return of others, or of that artificial person or corporation of which such one is the head, or of which such majority is the major part. Thus a mandamus to a municipal corporation must, as before stated,(j) be returned by the mayor, and his return will be taken to be the return of the corporate body. If, however, the major part thereof disagree to such return, as being false in fact, or contrary to their intention, &c., they may obtain a criminal information against the mayor, but cannot disavow it.(k) Thus, if a writ of mandamus be directed to several, as to the “mayor, bailiffs, &c.,” and the mayor alone, who is the most principal and proper person, returns and brings in the writ, the Court will not, upon affidavits, examine whether such return had the consent of the majority, but will take the return and leave such majority to punish the mayor for such misdemeanor, and to that end will grant leave to file criminal information against him.(l) But if the majority of such a corporation make a return in the name of the mayor, without his *consent, he may come to the Court within the same term [*368] in which it is filed and disavow it, but after that term the Court will assume it to be his return.(m) So if the mandamus be directed to a single officer, as a sheriff, and a return be made by a stranger without his privity, he may and should come and disavow it.(n)

It is necessary, as before stated, to the validity of a return that it be filed, for after it is so filed it becomes a record, and can neither be impeached or disavowed.(o) Therefore, when it is wished to disavow a return, a motion should, by counsel, be made to the Court of Queen’s Bench for leave “to stay the filing of it,” and upon a proper case for disavowal being made, the Court will so stay it.(p)

The application, as shewn by the cases, may be made at any time during

where the return was by consent withdrawn, and a peremptory mandamus awarded.

(h) *R. v. Payn*, 3 N. & P. 165. S. C. 6 A. & E. 392, 402.† S. C. 1 W. W. & H. 99, 105. S. C. 2 Jur. 47.

(i) *R. v. Barker*, Burr. 1379. S. C. 1 W. Blac. 300, 352; but see *supra*, n. (f), (g).

(j) See ante, p. 342, n. (o).

(k) See ante, p. 342, n. (o). *R. v. Bath* (Mayor), 6 Mod. 152. See also *R. v. Monday*, Cowp. 538.

(l) *R. v. Abingdon* (Mayor), 2 Salk. 431. S. C. Holt, 440. *R. v. Hoskins*, Cas. temp. Hard. 188. *Powell v. Price*, Comb. 41, 213, but see ante, p. 342, and the case of *Abingdon Town*, Carth. 499, 500, where a return by the mayor alone to a writ, directed to the whole corporation, was on debate held to be bad. Bac. Abr. tit. “Man.” (G.) See post. tit. “Action, &c., for false Return.”

(m) *R. v. Chapman*, 6 Mod. 152. S. C. Holt, 443. See ante, p. 324, n. (m).

(n) *Anon.*, Dyer, 182 b, E. T. 2 Eliz. *R. v. Abingdon* (Mayor), Holt, 440.

(o) Ante, p. 365, n. (ll). *R. v. Wigan* (Mayor), Burr. 1641, 1646.

(p) See ante, p. 366, n. (c). *R. v. Abingdon* (Mayor), 2 Salk. 431. S. C. Holt, 440, *supra*, n. (o).

that Term in which the writ is returned, but not after.(g) The Court, if they grant the rule, will not, by such disavowal, allow the prosecutor to be prejudiced, but will impose terms on the disavowments, such as by commanding them to put in a return by a limited time. Indeed the disavowants usually pray, as a part of their rule, that they may be at liberty to file another return, &c.(r)

—.] *Amendment of Return.*—At common law a return was not allowed to be amended after it had been filed, not even in matter of mere form.(s) In process of time, however, this strict rule became somewhat relaxed, and a clerical mistake was allowed to be amended after the Term in which the return was made or filed.(t) Thus, a return that one Far-*rington*, “non fuit electus, et perfectus in locum et officium, unius communis concilii, ac un’ alderman’ civitat’ Cicestr’,” was allowed to be amended (because they were several offices, and the prosecutor might have been chosen to one and not to the other), by adding “vel aliquem eorum,” it being only a mistake of the clerk of the Crown Office, his instructions being general.(u)

At a subsequent period the doctrine as to amending mistakes in *a return, although not reduced to any certain rule, was extended [*369] beyond mere clerical errors, but in such case was entirely a matter for the Court’s discretion. There is no certain rule, but the principle which governs the Court is, “that an amendment shall or shall not be permitted to be made, as it will best tend to the furtherance of justice.”(v) Thus, the Court has refused to permit the defendants, after verdict on a traverse to a return to a mandamus, to make amendments verifying the description of the condition of a borough.(w) But, on the contrary, a mistake in a return in setting forth a conviction, that the prosecutor had been found guilty of the charges in the third and fourth articles, without having stated in the preceding part that the complaint consisted of four articles, was allowed to be amended; and this, although by the recital of the complaint in the return it seems rather to be stated as containing only two, and that it did not therefore certainly appear that the articles on which the prosecutor was convicted were the same which were set forth as containing the accusations against him.(x)

(g) *Supra*, n. (p). (r) *R. v. Abingdon (Mayor)*, 2 Salk. 431. S. C. Holt, 440.

(s) See ante, p. 334, n. (m). *London (City) v. Eastwick*, Sty. 33. *R. v. New College*, 2 Lev. 14. *Coutanche v. Le Ruez*, 1 East, 134; 7 T. R. 704. See ante, tit. “Writ” (Amendment), 334, 335.

(t) See ante, p. 334, (o). *R. v. Chichester (Mayor)*, 1 Show. 273. *R. v. Lyme Regis (Mayor)*, 1 Doug. 135; Com. Dig. tit. “Man.” D. 5. Dr. Widdrington’s case, 1 Lev. 23. *R. v. Grampound (Mayor)*, 7 T. R. 701; Bac. Abr. tit. “Man.” (L.)

(u) 1 Show. 273, *supra*, n. (t), and see *R. v. Lyme Regis (Mayor)*, 1 Doug. 136, n. (4). See ante, tit. “Writ” (Amendment), p. 334, 345.

(v) *R. v. Grampound (Mayor)*, 7 T. R. 699; 1 Doug. 135, n. (F.) *R. v. Marriott*, 1 D. & R. 167.† *R. v. Bristol (Mayor)*, 1 Show. 288. S. C. Comb. 145. See stats. 4 Ann. c. 16, 9 Ann. c. 20.

(w) 1 Doug. 135, n. (F.); but see *R. v. Armstrong*, Andr. 109. *R. v. Grampound (Mayor)*, 7 T. R. 702.

(x) 1 Doug. 135, *supra*, n. (w).

If the defendant be dissatisfied with, or his return be insufficient, he may apply to the Court, on motion, for a rule to show cause why it should not be amended,(y) taking care to state the particular amendments, as they should be inserted in the rule nisi.(z) In granting the rule, the Court will, as such amendments are, as before stated, entirely within the discretion of the Court, impose its own terms on the defendant; thus, in one case, an amendment was allowed, upon the defendant undertaking, if an action for a false return should be brought, to take short notice of trial, and not to bring a writ of error if there should be judgment against them.(a)

On motion to quash the return for being hypothetical or uncertain, &c., the Court will usually give leave to amend.(b)

—.] *Invalidating Return.*—Having, in the preceding pages, at some length shewu the necessary constituents of a valid return, we now proceed to detail how far a defective return may be invalidated, and to premise some new rules for construing a return, in order that its legal sufficiency may be readily tested.

In order to ascertain whether a return be or not a legal answer to the writ, it is unnecessary to comment upon every portion of it, or to show [*370] that every part of it is valid, for it is sufficient if on the whole it disclose a fair legal reason why the mandamus should not be obeyed; therefore, in order to judge whether the one be or not an adequate answer to the other, the allegations of the writ must be looked at, and the return considered in relation with them.(c) Thus, where a writ suggested a due election of the prosecutor by the persons entitled to elect; a return thereto, which stated facts and documents from which it appeared that there was no right in the electors, was held to be sufficient, although it did not deny the right in direct terms.(d) The principle upon which this decision was founded is the well acknowledged one, that *the return must answer not the words only, but the materiality of the writ*; therefore, a return which seems to be guarded and not to deny the substance of the writ is bad.(e) Again, where to a writ directed to A. mayor, &c., it was returned, that before the writ was awarded, A. was removed from his office of mayor, that B. was elected thereto and then was mayor,

(y) R. v. Marriott, 1 D. & R. 166,† and see 11 A. & E. 27, 28,† n.

(z) 1 Doug. 135, supra, n. (w).

(a) 1 Doug. 136, supra, n. (w).

(b) R. v. London Dock, 5 A. & E. 163.† S. C. 6 N. & M. 390.† See post, tit. "Invalidating Return."

(c) R. v. York (Archbp.), 6 T. R. 492, 495, per Grose, J. R. v. Monmouth (Mayor), 4 B. & A. 497.† R. v. Lyme Regis (Mayor), 1 Doug. 85. R. v. Ilchester (Bailiffs), 2 B. & C. 766.† S. C. 4 D. & R. 330,† per Bayley, J. R. v. Welbeck (Inhabs.), Stra. 1143. Com. Dig. tit "Man." D. 3. R. v. Dartmouth (Mayor), 3 Salk. 229.

(d) R. v. Kendall, 1 Q. B. 378.† S. C. 4 P. & D. 602. See ante as to the defect of argumentativeness, p. 357, n. (c).

(e) Ante, p. 348—351. R. v. Lyme Regis (Mayor), 1 Doug. 85. R. v. York (Mayor), 5 T. R. 70. R. v. Ward (Dr.), Fitzg. 195. R. v. Saltash (Mayor), Raym. 432. S. C. Jon. 177.

it was held that such a return was bad, for by a collusive resignation of his office by A. the writ might be evaded.(f)

The rule as to the construction of a return by presumption and intentment was prior to the passing of stat. 9 Ann. c. 20,(g) that *the return must be taken to be true until falsified in an action for a false return*,(h) but such rule was subject to an exception where the matter of the return appeared to the Court to be false as to such facts of which they were judicially cognizant, or where the return had any patent defect, as repugnancy, &c.(i) At this day however, by means of those legislative enactments,(j), which have so closely assimilated the pleadings incident to the writ of mandamus to those which obtain in personal actions, and left the procedure by way of action for the false return, entirely at the pleasure and discretion of the prosecutor,(k) *the above rule has become [*371] not only of rare application, but other rules by which the validity of a return may be tested have been introduced. The first of them is, *that no legal fact shall be intended in a return to a mandams, unless properly expressed therein*.(l) Thus where to a mandamus to restore to the office of clerk of the peace, it was returned that the prosecutor had improperly refused to deliver the county rolls to the custos rotulorum upon request, that articles had been exhibited against him in sessions, that he had there also refused, and that thereupon he was removed by order of the justices according to the stat. 1 Wm. & M. st. 1, c. 21, to this return it was objected, that it did not shew that the *articles* were *in writing*, as they should have been agreeably with the above statute, and the Court in giving judgment said, that "nothing is to be intended in a return to a mandamus," and as the word "articles" did not ex vi termini import a *writing*,(m) they quashed the return.

The second rule is, that "The Court will not in order to support a return, draw an inference if there be no legal facts stated, from whence such inference can be deduced." Thus, where to a writ of mandamus to command the defendants to certify the election of A. B. as recorder, the return stated, that the mayor and sheriffs of the said city and the major part of the aldermen, those who had been sheriffs and of the common council *were not duly assembled* in the common hall of the said city to

(f) R. v. Saltash (Mayor), Ray. 431, 365. S. C. Jon. 177; Com. Dig. tit. "Man." D. 4.

(g) See App., and ante, p. 6, n. (q), (r), 7, (s). As to Ireland, see stat. 19 Geo. 2, c. 12, App.

(h) R. v. London (Mayor), 12 Mod. 17. S. C. Skin. 293. Anon., 1 Keb. 79. R. v. Lyme Regis (Mayor), 1 Doug. 159. Braithwaite's case, 1 Vent. 19. R. v. Oxford (Mayor), Palm. 455. R. v. York (Archbp.), 6 T. R. 491.

(i) R. v. London City, Skin. 293.

(j) See ante, p. 7, n. (v), 8, n. (u), (y), and stat. 9 Ann. c. 20, s. 7, extended by stat. 1 Wm. 4, c. 21, App. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App.

(k) Ante, p. 6, n. (q), (r), 7.

(l) R. v. Bristol (Mayor), 1 Show. 288. R. v. London (City), Skin. 293. S. C. 12 Mod. 17.

(m) R. v. Evans, 1 Show. 822. S. C. Holt, 188. S. C. 4 Mod. 31. S. C. 12 Mod. 13. See supra, n. (l).

proceed to the election of a recorder, for the said city as by the writ was supposed. The Court in quashing the return held, that the defendants should have shewn in what particular they were not assembled for the purpose of electing a recorder, inasmuch as they had admitted by such return that they were assembled, but alleged it was for some other purpose.(n)

The third rule is, that, "*if a return contain legal facts sufficient to support an inference necessary to its validity, the Court will draw such inference and uphold the return.*" Thus where a return alleged *fait amotus per majorem et burgenses*, it was held to be sufficient though the power by the charter, &c., was given to the mayor and burgesses who had been mayors, because as in such a case it shall be intended, that all the burgesses were present and assented, so if the major part of them who had been mayors did not assent, an action might be brought for a false return.(o)

*The fourth rule is, that "*The Court cannot assume an illegality* [^{*372}] *or legal facts inconsistent with a return in order to invalidate it,*" as that an assembly to elect, &c., was unduly convened, which does not by the return appear to have been so.(p) The same rule has been propounded by Buller, J.(q) thus "if a return be certain on the face of it, that is sufficient, and the Court cannot intend facts inconsistent with it for the purpose of making it bad."

The fifth rule is, that "*The Court in construing a return will not presume either for or against its validity.*(r)

The sixth and last rule as to construing a return, is that, "*The Court will take notice of such legal facts of which they are judicially cognizant, though they be not particularly stated.*" Thus in a return to a mandamus to restore to a municipal office, if it be stated that the prosecutor was removed by the municipal body at large for a corporate offence, it is unnecessary to aver that a power of removal for such offence is vested in such corporation, because the law takes notice that such a power is inherent in its constitution.(s)

—.] *Motion to quash Return.*—The legal formulæ by which a defective return may be invalidated are two, the one by "motion to quash," which is resorted to, when the return is vicious by reason of any clear and well acknowledged defect; the other by "demurrer," which is when the return is insufficient for defects which are not so apparent to the Court, but that they require the invalidity of the return to be tested by a solemn argument. The proceeding by "demurrer" has by a late

(n) R. v. York (Mayor), 5 T. R. 74; Bac. Abr. tit. "Man." (J.)

(o) Braithwaite's case, 1 Vent. 20; Com. Dig. tit. "Man." D. 3.

(p) R. v. Shrewsbury (Corp.), Kel. 284. S. C. Stra. 1051. S. C. 7 Mod. 201. Bac. Abr. tit. "Man." (J.) R. v. W. Riding (J.), 16 L. J., N. S., M. C. 171.

(q) R. v. Lyme Regis (Mayor), 1 Doug. 159.

(r) R. v. Lyme Regis (Mayor), 1 Doug. 158, per Ld. Mansfield.

(s) See ante, p. 199. R. v. Lyme Regis (Mayor) 1 Doug. 159. R. v. Cambridge (Mayor), 2 T. R. 459. See Steph. on Pl. p. 383, 5th edit.

statute(*t*) been substituted for that of "concilium," which in effect was exactly the same.

As the statute of 9 Ann. c. 20, is altogether silent as to the formulæ, whereby a return when insufficient should be invalidated, the Court of B. R. in the absence of any express direction, adopted a practice similar to that which obtains in the case of vicious pleas in personal actions; viz. that when the return is upon the face of it palpably a tricky one, framed only for the purpose of delaying the prosecutor, (*u*) the Court will on motion quash it and in some cases award to the prosecutor a peremptory *mandamus. (*v*) The Court of B. R. has often and expressly stated, that it has the jurisdiction of interfering summarily in such [*373] cases where it deems it proper to do so, (*w*) and that it is perfectly discretionary with such Court to determine the validity, of the whole or part of a return either on demurrer (formerly concilium), or on motion to quash. (*x*) The Court will not however quash a return on motion, unless it be manifestly frivolous or contemptuous, (*y*) or clearly bad on the face of it, (*z*) so that if the return be not frivolous, &c., or clearly bad upon the face of it, its validity must be argued on a demurrer, and not on a rule to quash, (*a*) and the Court will refuse to hear the return discussed on motion to quash on the ground of urgency of the circumstances, but in such a case will direct the case to be argued on an early day upon demurrer. (*b*) If, therefore, the return be prima facie sufficient, the Court will not inquire into the truth of the facts returned, but will on motion to quash the return, consider only whether the matter of fact returned be a sufficient answer or not to the mandamus. (*c*)

The Court will quash a return if, as before stated, it be upon its face palpably a tricky one, framed only for the purpose of delaying the prosecutor; so if it be hypothetical or uncertain; but in the latter cases leave

(*t*) See stat. 6 & 7 Vict. c. 67, s. 1, App. As to Ireland, which is governed by a legislative provision, in effect exactly the same, see stat. 9 & 10 Vict. c. 113 (*b*), App.

(*u*) See Chit. Prae. 265. R. v. Payn, 3 P. & D. 625. S. C. 11 A. & E. 955.† S. C. 2 Rail. Cas. 1. S. C. 1 Jur. 54.

(*v*) R. v. Oundle (Manor), 1 A. & E. 297.† S. C. 3 N. & M. 484.† R. v. Cambridge (Mayor), 2 T. R. 460, 461.

Formerly, if one contemptuously made an ill return, the Court amerced him, and refused to allow him to quash the return and make another. Anon. 12 Mod. 410. S. C. nom. Lord v. Francis, Holt, 170, 171, ante, p. 266, n. (*x*), (*y*).

(*w*) R. v. Payn, 3 P. & D. 625. S. C. 11 A. & E. 955.† S. C. 2 Rail. Cas. 1.

(*x*) R. v. St. Katherine's Dock, 4 B. & Ad. 360.† S. C. 1 N. & M. 121.† R. v. Payn, 3 P. & D. 625. S. C. 11 A. & E. 955.† S. C. 2 Rail. Cas. 1. R. v. Swansea Harbour, 8 A. & E. 449, † n. (*a*). S. C. 1 P. & D. 512. R. v. Nottingham (Mayor), Say, 36, per Lee, C. J.

(*y*) R. v. Payn, 6 A. & E. 392, 403.† S. C. 1 N. & P. 524.† See R. v. St. Saviour, 7 A. & E. 925, 936.† S. C. 3 N. & P. 126. S. C. 1 N. & P. 496.† R. v. Kendall, 1 Q. B. 374.† S. C. 4 P. & D. 602. S. C. 10 L. J., N. S. 137, Q. B. R. v. Williams, 3 M. & R. 404. S. C. 8 B. & C. 681.†

(*z*) 4 B. & Ad. 360.† S. C. 1 N. & M. 121, † supra, n. (*x*). R. v. Hungerford Market, 4 B. & Ad. 335, † n. R. v. St. Andrew, 10 A. & E. 739.†

(*a*) Ante, p. 372, n. (*t*); 7 A. & E. 925.† S. C. 3 N. & P. 126. S. C. 1 N. & P. 496, † supra, n. (*y*). R. v. Harham Roads (Trustees), 4 Jur. 50.

(*b*) 7 A. & E. 925.† S. C. 1 N. & P. 496.† S. C. 3 N. & P. 126, supra, n. (*y*).

(*c*) Ante, p. 6. R. v. Williams, Say, 141, per Ryder, C. J.

to amend is usually allowed ;(*d*) but not if it be quashed, as in the former case, for insufficiency of merits.(*e*) So, the Court will *quash it, [*374] if it be repugnant and contradictory.(*f*) Also, as the defendant ought not to embarrass the record with matter which makes it impossible for the prosecutor to plead, or to know what it is he has to answer, so the Court will quash a return which is defective for this cause.(*g*) So if a return consist of several independent matters, which are inconsistent, the whole return must be quashed.(*h*) But the Court will quash only part of a return consisting of several independent answers, some of which are sufficient in law, and some not, provided they are not inconsistent ;(*i*) and in that case will direct an issue as to the other part, which if found by the jury for the defendant, will be sufficient to prevent a peremptory mandamus.(*j*) The Court will not quash a return on affidavits of its falsity,(*k*) nor because it was filed too late.(*l*)

— *Application ; Affidavits.*—If the ground of the motion to quash be any defect apparent on the return, or because of its invalidity in point of law, affidavits are not required ; but if the case require that any fact or facts should be deposed to, such affidavits must be produced.(*m*)

— *Rule.*—The rule nisi for quashing a return, where it is palpably defective, need not go into the Crown paper ;(*n*) in such case, the Court will either appoint an early day for its argument, or direct it to be brought on as an ordinary rule.

—.] *Shewing Cause.*—In shewing cause against the rule nisi, the defendant may insist upon any objection to the writ, which shews that it should not have issued.(*o*)

(*d*) Ante, p. 369, n. (*b*). R. v. London Dock, 5 A. & E. 163.† S. C. 6 N. & M. 390.† See ante, tit. "Writ" (Amendment).

(*e*) R. v. Norwich (Dean), Stra. 159. R. v. March, Burr. 1005. R. v. Raines, 3 Salk. 232, 11. R. v. St. Andrew, 10 A. & E. 736.† R. v. Doncaster (Mayor), Burr. 745. R. v. Eastern Counties Railway, 10 A. & E. 555.† S. C. 1 Rail. Cas. 509. S. C. 4 P. & D. 48 ; and see 3 A. & E. 544.† R. v. Wix (Inhabs.), 2 B. & Ad. 203.† See ante, tit. "Amendment," p. 368, 369.

(*f*) Ante, p. 361, n. (*k*). R. v. Old Hall (Manor), 10 A. & E. 253.† R. v. Norwich (Mayor), 2 Salk. 436, 17. S. C. Ld. Raym. 1244. S. C. Holt, 444.

(*g*) R. v. Old Hall (Manor), 10 A. & E. 253.† R. v. Norwich (Mayor), 2 Salk. 436. S. C. Ld. Raym. 1244.

(*h*) R. v. York (Mayor), 5 T. R. 69, 74, per Ld. Kenyon, C. J. R. v. Norwich (Mayor), Ld. Raym. 1244. S. C. 2 Salk. 436, 17. R. v. Cambridge (Mayor), 2 T. R. 456 ; Bac. Abr. tit. "Man." (J.) See ante, p. 361, n. (*k*).

As to double and inconsistent returns, see ante, p. 360—362.

(*i*) See ante, p. 360, n. (*a*). R. v. North Midland Railway, 11 A. & E. 956,† n. (*b*). S. C. 3 P. & D. 622. R. v. London (Mayor), 3 B. & Ad. 255.† R. v. Cambridge (Mayor), 2 T. R. 456.

(*j*) R. v. Cambridge (Mayor), 2 T. R. 461, and supra, n. (*h*).

(*k*) R. v. Payn, 6 A. & E. 392.† S. C. 1 N. & P. 524.† R. v. West Riding (J.), 7 T. R. 467. R. v. Old Hall (Manor), 10 A. & E. 256.† Goubot v. De Crouy, 1 Crompt. & M. 772.* S. C. 3 Tyrwh. 906. S. C. 2 D. 86. R. v. Round, 5 N. & M. 427,† n. (*b*). S. C. 4 A. & E. 139.†

(*l*) R. v. Kendall, 1 Q. B. 374,† per Lord Denman, C. J.

(*m*) R. v. St. Katharine's Dock, 4 B. & Ad. 360.† S. C. 1 N. & M. 121.† And see 6 A. & E. 405.† S. C. 1 N. & P. 528.†

(*n*) R. v. St. Katharine's Dock, 1 N. & M. 121.† S. C. 4 B. & Ad. 360.†

(*o*) See p. 336, n. (*m*), 338, n. (*c*). See stat. 6 & 7 Vict. c. 67, s. 1 (E.), and 9

*——. *Rule Absolute*.—If upon argument, the Court be of opinion that the return is insufficient, a rule to quash it will be granted, which must be drawn up and entered in the Crown Office, but need not be served, and a peremptory writ of mandamus ordered to issue.(p).

——.] *Demurrer to Return*.—We have by the few lastly preceding pages, briefly considered the former of the alternative formulæ by which a return may be invalidated, viz. a “motion to quash;” we now proceed to consider the latter of such legal formulæ, namely, the proceeding by way of “demurrer,” which has by a late statute(g) been substituted for a “concilium,” which in effect was precisely equivalent to a demurrer;(r) for thereby the whole question of law, including that of the goodness of the writ of mandamus itself, was considered,(s) and also that if a judgment establishing the validity of the return in law were given, the prosecutor could not afterwards traverse the facts contained in it.(t) So where on a return, a concilium had been obtained, and the return on argument held insufficient in law, and a peremptory mandamus awarded, the Court would not, at the instance of the party making such return, withhold the peremptory writ, and direct the prosecutor to demur to the return, in order that the case might go to a Court of Error.(u)

& 10 Vict. c. 113, s. 6 (l.), App. R. v. St. Katharine's Dock, 1 N. & M. 121.† S. C. 4 B. & Ad. 360, 363;† per Parke, J. R. v. Margate Pier, 3 B. & A. 220.† R. v. Bristow, 6 T. R. 168. See ante, tit. “Writ” (Amendment). Formerly the Court would only hear one counsel of a side on the same day; Comb. 280.

As to affidavits to be used on argument, see R. v. Harham Road (Trustees), 4 Jur. 50.

(p) See ante, p. 339; Gude's Cr. Pr. 186. R. v. Ouze Bank Commissioners, 3 A. & E. 549.† R. v. Liverpool (Mayor), Burr. 735. R. v. Doncaster (Mayor), Burr. 745. And see 5 T. R. 69; Ld. Raym. 1244. S. C. 2 Salk. 436, 17.

(q) See ante, p. 372, n. (t).

(r) R. v. Oundle (Mayor), 1 A. & E. 297, 299.† S. C. 3 N. & M. 484.† R. v. Eastern Counties Railway, 10 A. & E. 558.† S. C. 4 P. & D. 48. R. v. Dublin (Dean), Stra. 537. R. v. Birmingham Railway, 2 Q. B. 47.† S. C. 1 G. & D. 324. See stat. 9 Ann. c. 20, s. 2. R. v. London (Mayor), 3 B. & Ad. 259.

The mode of obtaining the opinion of the Court upon a return, by way of “Concilium” was this,—the prosecutor obtained a motion paper signed by counsel, indorsed “to move for a ‘Concilium’ to quash the return, and for a peremptory mandamus,” which being taken to the Crown Office, the rule was drawn up and entered, and the case inserted in the Crown paper for argument: the subsequent proceedings were similar to those of demurrer. Gude's Cr. Pr. 185, 186. R. v. St. Pancras (Trustees), 3 A. & E. 535.† S. C. 5 N. & M. 222.† Cr. Off. Rules, r. 22, App.

The rule must have been obtained by the prosecutor before he had pleaded, for after having taken that step he was not at liberty to withdraw his plea and set down the return for argument on concilium; a rule nisi for that purpose has been discharged on the ground that the effect of it would be to deprive the defendant of the opportunity of taking the case to a Court of Error. Wilsford v. Doncaster (Mayor), Burr. 738. R. v. York (Mayor), 2 G. & D. 585, n. (a). R. v. West Riding (J.), 5 Q. B. 1.† R. v. Old Hall (Manor), 10 A. & E. 555.† S. C. 2 P. & D. 518. S. C. W. W. & D. 650. See ante, p. 372, n. (t).

(s) Ante, p. 338, n. (c), 374, n. (o). R. v. Eastern Counties Railway, 10 A. & E. 558.† S. C. 4 P. & D. 48. S. C. 1 Rail. Cas. 509.

(t) R. v. Oundle (Mayor), 1 A. & E. 299,† per Patteson, J. R. v. London (Mayor), 3 B. & Ad. 275.† S. C. 2 N. & M. 126.† R. v. Payn, 11 A. & E. 957.†

(u) R. v. Oundle (Manor), 1 A. & E. 283, 297.† S. C. 3 N. & M. 484, 496.†

It is singular that although the stat. 9 Ann. c. 20, s. 2. permits the prosecutor merely to plead to, or traverse a return, yet should allow the defendant to reply, take issue or demur to such plea or traverse, or in other words that the power to demur should have been specifically given to the defendant and not to the prosecutor. It was this distinction which gave rise to the practice, that where an insufficient return was filed, the prosecutor was allowed to make an application to the Court, in the nature of a demurrer, and called a "concilium" to quash it, which if it were granted and were ultimately successful, a peremptory mandamus was at once awarded, as there could be no proceeding by writ of error.^(v) This method of procedure being found to be in many cases greatly inconvenient, the more so as writs of mandamus had of late years very much increased, and were frequently awarded in cases of considerable importance, it became necessary for the purposes of justice that the prosecutor should have the power to demur to a return made to any such writ, in order that the decision of the Courts having jurisdiction over them, as to the validity of such return, should be reviewed by a Court of Error for remedy, whereof it is by stat. 6 & 7 Vict. c. 67, s. 1,^(w) enacted, that in all cases in which the prosecutor of any writ of mandamus shall wish or intend to object to the validity of any return, then or thereafter to be made to the same, he shall do so by way of demurrer to the same in such and the like manner as is now practised and used in the Court of B. R., or the Courts of the counties palatine in personal actions, and thereupon the same writ and return and the said demurrer shall be entered upon record in the said Courts respectively, and such and the like further proceedings shall be thereupon had and taken as upon a demurrer, to pleadings in personal actions in the said Courts respectively, and the said Courts respectively shall thereupon adjudge either that the said return is valid in law, or that it is not valid in law, or that the writ of mandamus is not valid in law, and if they adjudge that the said writ is valid in law, [*377] but *that the return thereto is not valid in law, then and in every such case they shall also by their said judgment award that a peremptory mandamus shall issue in that behalf, and thereupon such peremptory writ of mandamus may be sued out and issued accordingly, at any time after four days from the signing of the said judgment, and it shall be lawful for the said Courts respectively, and they are thereby required in and by their said judgment to award costs to be paid to the party in whose favour they shall thereby decide, by the other party or parties.

(v) *R. v. Cambridge (Mayor)*, 2 T. R. 460, 461. *R. v. Oundle (Manor)*, 1 A. & E. 297, 298.† *R. v. Eastern Counties Railway*, 10 A. & E. 358.† S. C. 4 P. & D. 45. S. C. 1 Rail. Cas. 509. As to obtaining time to demur, see stat. 9 Ann. c. 20, s. 6, App. As to quashing return, see ante, p. 372—375. As to Ireland, see stat. 19 Geo. 2, c. 12, App.

(w) See stat. App. As to Ireland, see the provision totidem verbis in stat. 9 & 10 Vict. c. 113, s. 6, App.

As before stated, (x) it is discretionary with the Court either to determine the validity of a return on motion to quash, or to direct the prosecutor to demur, in order that the case be set down in the Crown paper for argument. (y) If the return be clearly bad on the face of it, the Court will quash it on motion; (z) but if it be not clearly bad upon the face of it, nor frivolous, or if it raise matters of law, its validity must be argued on demurrer, and not on a rule to quash it. (a) So, if the return disclose a case of difficulty, the Court usually orders it to be brought on in the Crown paper; (b) or if it involve an abstruse question of law will direct it to be set down in the special paper for an argument. (c)

The form and practice of a demurrer in the case of a mandamus is by stat. 6 & 7 Vict. c. 67, s. 1, (E.), and 9 & 10 Vict. c. 113, s. 6, (I.), the same in all respects as a demurrer in the case of personal actions. (d) The demurrer must be entered at the Crown office, and a copy filed there beside the one delivered to the opposite party.

—.] *Joinder in Demurrer*.—There must be one and only one side bar rule to join in demurrer which must be drawn up and served upon the opposite party, (and no peremptory rule given thereon), it expires in four days next after service. (e) The joinder must be entered at the Crown office, and delivered and filed as the demurrer, and on default being made judgment by default may be signed. (f) If on the other hand a joinder in demurrer be filed and delivered, either party

(x) See tit. "Quashing Return," p. 372—375.

(y) *R. v. St. Katharine's Dock*, 4 B. & Ad. 360,† S. C. 1 N. & M. 121,†

(z) See tit. "Quashing Return," ante, p. 372—375; 4 B. & Ad. 362,† S. C. 1 N. & M. 121,† Ante, p. 372, n. (t).

(a) *R. v. St. Saviour's (Parish)*, 3 N. & P. 123. S. C. 7 A. & E. 225,† *R. v. Payn*, 3 N. & P. 165. *R. v. Round*, 4 A. & E. 136,† S. C. 5 N. & M. 427,† S. C. 1 H. & W. 549. *R. v. St. Margaret Parish*, 1 P. & D. 124, n. 1,† S. C. 8 A. & E. 889,† S. C. 2 P. & D. 519.

(b) 4 B. & Ad. 360,† S. C. 1 N. & M. 121,† supra, n. y. *R. v. London Mayor*, 3 B. & Ad. 253,† S. C. 2 N. & M. 126,†

(c) *R. v. Mildmay (Dame)*, 5 B. & Ad. 253,† S. C. 2 N. & M. 775,†

(d) For the practice of a demurrer in personal actions, see Chit. Prac. 527—537, 5th edit.

As to cases within the stats. 1 Wm. 4. c. 21, s. 4 (E.), and 9 & 10 Vict. c. 113, s. 3 (I.), (see stats. App.), it is thereby provided in whose name the demurrer shall be joined, and the proceedings to judgment carried on. See ante, p. 362, n. g, 313, n. (t), 342, n. (r).

(e) Crown Off. Rules, r. 18: see rules, App. Form of rule:—

"Saturday, the — day of —, in the — year of the reign of Queen Victoria.
In the Queen's Bench.

Venue.)

The Queen on the prosecution of S. B. & J. E.

agst.

J. W. and T. C., Chapelwardens.

Unless the defendants shall join in demurrer with the prosecutors, within four days next after service of this rule upon the attorney or agent for the said defendants, let judgment be entered for the said prosecutors against the said defendants, for want of a joinder in demurrer.

Side Bar. By the Court."

(f) Crown Off. Rules, r. 19, App. And see tit. "Pleas" (Judgment by default).

(usually the party demurring), may proceed without a previous motion or a rule for a "concilium," to set down (at the Crown office) the demurrer for argument. It has however been held that, when the business of a vacation sittings has been appointed, a demurrer cannot be argued at such sittings without the consent of the Court and of all parties. If, however, it be so agreed, the demurrer may be set down at such sittings to be argued as on a concilium, and with the same consequences.(g)

—.] *Paper Books.*—In all cases entered for argument in the Crown paper, the prosecutor or his attorney should deliver a paper book of the proceedings to each of the two senior Judges of the Court, and the defendant or his attorney should in like manner make and deliver a paper book to the third and fourth Judges of the said Court respectively, two days before the day on which the case will be put in the paper for argument; and such several paper books should in all cases, (except where a special case is reserved for the opinion of the Court), contain in the margin thereof, or appended thereto, and to be delivered therewith, the points intended to be argued, but should not contain any other observation or matter, than such points for argument, together with copies of the proceedings, and a copy of the rule nisi to quash, or for a concilium. Judgment may be given by the Court against a party neglecting to deliver paper books to the Judges, or delivering the same without the points for argument, if the Court shall so please.(h)

The briefs for counsel are the same as in ordinary cases.(i)

Where necessary for the attainment of justice, and to try the validity of a return, the Court of B. R. will, on motion, grant a rule to inspect corporation books, &c., though the corporation be not a party to the [*379] *dispute;(j) but such a rule will not be granted until after the filing of the return.(k) because, until then, the Court cannot see that such inspection will be necessary.(l) The Court never grants a rule to inspect corporation charters, as copies of them may be obtained at the Rolls.(m)

—.] *Argument.*—The case is called on for argument in its turn, and the arguments are conducted as in a demurrer in a personal action.(n) It is also the practice, on a demurrer to a return to a mandamus, to hear one counsel only on each side.(o)

It has been held, that when a return to a mandamus has been made,

(g) *R. v. Kendall*, 1 Q. B. 374.† S. C. 4 P. & D. 602. S. C. 10 L. J., N. S. 137, Q. B.

(h) Crown Off. Rules, r. 23, App. See form of points of demurrer. *R. v. Conyers*, 15 J. L., N. S. 300, Q. B. *R. v. Arnaud*, 16 L. J., N. S. 52, Q. B.

(i) See Chit. Prac. 833.

(j) *R. v. Newcastle Hostmen*, Stra. 1233; Gude's Cr. Pr. 189.

(k) *R. v. Nottingham*, 1 W. Blac. 58. *R. v. Surrey (J.)*, Say. 144, (the practice is otherwise on Quo Warranto).

(l) Anon., 1 Barn. 26. Anon., 2 Salk. 430. Com. Dig. tit. "Man." D. 2.

(m) *R. v. Tucker*, 1 Barn. 28. Anon. 2 Salk. 430.

(n) *R. v. St. Pancras (Trustees)*, 3 A. & E. 535, 538.† S. C. 5 N. & M. 222.†

(o) *R. v. Gordon*, 1 B. & A. 526,† n. (a).

and a concilium obtained, the counsel objecting to the return, i. e. counsel for the Crown, is entitled to begin, and must be heard first, though the opposite counsel take an objection to the form of the writ, *(oo)* as in the case of a demurrer in a personal action. *(p)*

No objection to a return can be made, except for defects apparent upon the face of it. *(q)* Nor will the Court permit a point that has been decided on the rule nisi for the writ to be again discussed on the demurrer. *(r)* Thus it is then too late to raise objections which impugn the propriety of originally issuing the writ, *(s)* as that the proper remedy was indictment, and not mandamus. *(t)*

It was formerly held, that it was too late, when arguing on the validity of a return, to make any objection to the writ itself, for the several reasons: first, that the defendant should have applied to the Court to have quashed it; secondly, that he, by making a return, precluded himself from objecting to that which he had elected to answer; *(u)* and lastly, because after the rule for the writ has been made *absolute, it was a [*380] rule, that all that was open for the defendant to do, was either to comply with the first writ, or to give a good legal answer to it, and that if neither were done, a peremptory mandamus would be awarded. *(v)* But these rules, and the decisions upon which they were founded, are clearly at variance with the latter authority, and the statutory provisions upon this point, and it may now be taken as a rule, that a defect in substance to the writ appearing on the record, may be taken advantage of after the return filed, or at any time before the issuing of the peremptory mandamus; *(w)* because *quod initio vitiosum est non potest tractu temporis convalescere*. *(x)* Thus, an objection that the writ is directed to a steward of a manor alone, in a case where the lord ought to be joined, is matter of substance, and may be taken at any time. *(x)* So where the writ is bad for excess, &c. *(y)*

(oo) R. v. St. Pancras (Trustees), 3 A. & E. 535, 538, † n. *(a)*. S. C. 5 N. & M. 222. † R. v. St. Pancras (Trustees), 6 A. & E. 314. † S. C. 1 N. & P. 597. †

(p) R. v. Smith, 13 L. J., N. S. 166, Q. B. S. C. 5 Q. B. 619. † S. C. 1 D. & M. 565.

(q) R. v. St. Margaret (Parish), 10 A. & E. 732, † n. *(a)*.

(r) R. v. Leicester (J.), 4 B. & C. 896, † n. *(a)*.

(s) R. v. Nottingham Old Waterworks, 6 A. & E. 365. † S. C. 1 N. & P. 480. † R. v. Katharine's Dock, 4 B. & Ad. 363. † S. C. 1 N. & M. 121. †

(t) R. v. Bristol Dock, 2 V. B. 64. † S. C. 1 G. & D. 236. S. C. 2 Rail. Cas. 599.

(u) See ante, p. 338, n. *(c)*, 374, n. *(o)*. R. v. York (Mayor), 5 T. R. 74, 75. See ante, tit. "Quashing Writ," p. 336—339.

(v) R. v. The Brewers' Company, 4 D. & R. 497. † S. C. 3 B. & C. 172. †

(w) R. v. Margate Pier, 3 B. & A. 221. † R. v. West Riding (J.), 7 T. R. 48. R. v. Physicians' Coll., Burr. 2742. R. v. Shepton Mallett (Overseers), 5 Mod. 420. R. v. Abingdon (Mayor), 2 Salk. 699, 700. S. C. Ld. Raym. 559. S. C. Carth. 499. R. v. Chester (City), 5 Mod. 10. R. v. Ward, Stra. 893. R. v. Tregony (Mayor), 8 Mod. 111, 127. Taylor v. Gloucester (City), 1 Roll. 409. R. v. Littleport (Parish), 6 Mod. 97. See stat. 6 & 7 Vict. c. 67, s. 1, App. As to Ireland, see stat. 9 & 10 Vict. c. 113, s. 6, App.

(x) D. 50, tit. 17, f. 29.

(xx) R. v. Powell, 1 Q. B. 352. † S. C. 4 P. & D. 719. S. C. 10 L. S., N. S. 148, Q. B. See ante, p. 158, n. *(j)*, *(k)*.

(y) R. v. St. Pancras (Trustees), 3 A. & E. 535. † S. C. 5 N. & M. 222. †

—.] *Judgment*.—The judgment is given as in ordinary cases. The Court, in giving judgment, will first dispose of the objections to the writ, for if that be bad, then the sufficiency or not of the return is immaterial.(z) Where one part only of a divisible return is bad, it will, not, on demurrer, in analogy to the practice as to “quashing,” render invalid that which per se is good.(a)

By stat. 6 & 7 Vict. c. 67, s. 1,(b) it is enacted that upon the argument of a demurrer, the Court shall adjudge either that the said return is valid in law, or that it is not valid in law, or that the writ of mandamus is not valid in law, and if they adjudge that the said writ is valid in law, but that the return thereto is not valid in law, then, and in every such case, they shall also, by their judgment, award that a peremptory mandamus shall issue in that behalf. And it shall be lawful for the said Courts respectively, and they are thereby required in and by their said judgment, [*381] to award costs to be paid to the party in *whose favour they shall thereby decide by the other party or parties.(c) The judgment, when given, is entered of record.(d)

—.] *Costs*.—It has been held, after argument and judgment on a return to a writ of mandamus, costs will be given to the successful party, unless very strong grounds of exemption be shown;(e) and also, that costs, in such case, are entirely within the discretion of the Court, under stat. 1 Wm. 4, c. 21, s. 6, although that section, in terms, provided only for the costs of an application, where the writ shall be refused, or issued and obeyed.(f) But by the subsequent stat. 6 & 7 Vict. c. 67, s. 1,(g) it would seem that the discretionary power conferred by stat. 1 Wm. 4, c. 21, s. 6, has been taken away, the words of the former act being, that

(z) *R. v. Darlington School*, 6 Q. B. 682, 697.† S. C. 14 L. J., N. S. 67, Q. B. *R. v. Bristol Dock*, 9 D. & R. 316.† S. C. 6 B. & C. 181, 189.†

(a) See ante, p. 374, n. (i). *R. v. New Windsor (Mayor)*, 7 Q. B. 908.† S. C. 13 L. J., N. S. 337, Q. B.

(b) See stat. App., and ante, p. 376.

(c) The stat. 9 & 10 Vict. c. 113, s. 6, as to Ireland, contains a like enactment.

(d) *R. v. St. Pancras (Trustees)*, 3 A. & E. 535, 538.† S. C. 5 N. & M. 222.† *R. v. Darlington School*, 6 Q. B. 682, 697.† S. C. 14 L. J., N. S. 67, Q. B.

The following is a form of judgment on conellium, affirming sufficiency of a return to a mandamus;—“Whereupon all and singular the premises having been “seen and fully understood by the Court of our said Lady the Queen now here, it “is considered and adjudged by the said Court here, that the said return is good “and sufficient in law to preclude him, the said M. S., from being admitted into “the said place and office of alderman of the ward of Portsoken, in the said city “of London, and that the said mayor and alderman of the city of London do go “without day in this behalf.” *R. v. London (Mayor)*, 3 B. & Ad. 275.† S. C. 2 N. & M. 126.†

(e) *R. v. Newcastle (Mayor)*, 1 Q. B. 751.† S. C. 1 G. & D. 388, cited in *R. v. St. Pancras*, 2 D., N. S. 957. *R. v. Dartmouth (Mayor)*, 2 D., N. S. 982. S. C. 12 L. J., N. S. 83, M. C. *R. v. St. Saviour*, 7 A. & E. 948.† S. C. 3 N. & P. 126. S. C. 1 N. & P. 496.† *R. v. Newbury (Mayor)*, 2 G. & D. 169. S. C. 1 Q. B. 751.† S. C. 11 L. J., N. S. 149, Q. B. See post, tit. “Costs.”

(f) *R. v. Scott*, 1 D. & L. 212. And see 1 Q. B. 751.† S. C. 1 G. & D. 388, and 1 G. & D. 117. S. C. 1 Q. B. 636,† and 1 G. & D. 127. S. C. 1 Q. B. 660.† S. C. 9 L. J., N. S. 362, Q. B.

(g) See a like enactment as to Ireland, 9 & 10 Vict. c. 113, s. 6, App.

“it shall be lawful for the said Courts respectively, and they are hereby required, in and by their said judgment, to award costs to be paid by the party in whose favour they shall thereby decide, by the other party or parties.”(h)

*CHAPTER THE SEVENTH.

[*382]

THE PLEA, REPLICATION, AND SUBSEQUENT PROCEEDINGS INCLUSIVE OF THE PEREMPTORY WRIT OF MANDAMUS.

HAVING in the preceding Chapter treated of the Return, and of those formulæ whereby it may be invalidated, if it bear upon its face evidence of its legal insufficiency, it is proposed in the present Chapter, agreeably with the following analysis, to treat both of those proceedings whereby the prosecutor or the defendant may have his right tried upon the merits, and also of the peremptory writ, to which the prosecutor is entitled if ultimately successful.

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—.] *What.*—The pleading with which the prosecutor meets or answers the defendant’s return, if sufficient in law, though false in fact,

(h) See further as to costs, post, tit. “Costs.”

[*383] *provided he does not wish to proceed at common law by way of action for the false return, is termed a *Plea*, which answers to the pleading of the same name in a personal action; except that in cases of mandamus it is, as in replevin, the prosecutor's pleading.(a)

At common law, no traverse to a return was allowed, the only remedy then available for the prosecutor, if injured by a return false in fact, being an action on the case for such false return,(b) which proceeding he could not, however, adopt, until such return had been adjudged to be good in law; for the alleged reason, that if it were insufficient in law, the prosecutor could not be prejudiced by it,(c) because the Court, on motion would quash it.(d) It was this grievance which induced the remedy which the prosecutor now has by stat. 9 Ann. c. 20, s. 2, whereby he is empowered to plead to or traverse the facts in the return, as in an action on the case for a false return; the practical effect of which is, that if the issue on the traverse be found for the prosecutor, it becomes immaterial whether the return be or not sufficient in law; for he is entitled to have a peremptory mandamus, in the same manner as he would have had, if the return have been adjudged insufficient: so that if it turn out that the return is untrue in fact, the result is the same as though it be true in fact, and insufficient in law.(e) The above stat. 9 Ann. c. 20, which has application to municipal offices only, has been subsequently extended by stat. 1 Wm. 4, c. 21, to writs of mandamus in all other cases.(f)

—]. *Time to Plead.*—The prosecutor should, pursuant to stat. 9 Ann. c. 20, s. 2, (g), within a reasonable time,(h) plead to the return.

[*384] *After judgment has been entered on demurrer to the return, the prosecutor has no right to file pleas traversing such return, and if filed, the Court will, on motion, order them to be taken off the file;(i) which rule proceeds on the assumption, that the Court will not

(a) See stats. App. As to Ireland, see stat. 19 Geo. 2, c. 12, App. See post, tit. "Action, &c., for false return."

(b) See ante, p. 6, 7. *Awdley's case*, Latch. 124. S. C. Poph. 176. Fall v. Reg., 2 G. & D. 804. And see Burr. 729; 1 Sid. 410; 1 Vent. 11; 2 Salk. 432; Stra. 58. See post, tit. "Action for false return."

(c) *Enfield v. Hills*, 2 Lev. 236, 238. *R. v. London (Mayor)*, 3 B. & Ad. 276, 279.† Com. Dig. tit. "Man." D. 6.

(d) See ante, p. 335, 336, and post, tit. "Action, &c. for false return."

(e) Ante, p. 7, n. (t), (u). *R. v. London (Mayor)*, 3 B. & Ad. 279,† per Lord Tenterden, C. J. *Kynaston v. Shrewsbury*, Stra. 1051. *R. v. Trinity Chapel (Dean)*, 8 Mod. 28. *Bagg's case*, 11 Rep. 99 b.; Bull. N. P. 204; Bac. Abr. tit. "Man." (K.) As to Ireland, see stat. 19 Geo. 2, c. 12, App.

(f) See stat. App. As to Ireland, see stat. 9 & 10 Vict. c. 113, App., which extends the stat. 1 Wm. 4, c. 21, to Ireland. As to returns by way of traverse, see ante, p. 348—351.

As to traverses in general see the several subjects of the alphabetical series and p. 194.

(g) See stat. App. As to Ireland, see stat. 19 Geo. 2 c. 12 App. See post, tit. "Action, &c., for false return."

(h) Ante, p. 7, n. (u). *R. v. Swansea (Corp.)*, E., 24 Geo. 3; Gude's Cr. Pr. 192.

(i) *R. v. London (Mayor)*, 3 B. & Ad. 255, 276.† But see *R. v. London (Mayor)*, 16 L. J., N. S. 190, Q. B., where the Court, after judgment on demurrer, suggested to counsel a permission to traverse the return.

allow a return to be traversed after it has been held good upon demurrer. (*j*) But if the Court quash as well on demurrer, as upon motion, part of a return to a mandamus, which consists of several independent, but consistent matters, some of which are sufficient, and others not, the prosecutor may, by leave of the Court, traverse the subsisting part of such return. (*k*) The Court has not, however, yet settled, to what extent a traverse to a return will be allowed, after it has been held good on demurrer; at all events, the rule as to not allowing a traverse after a demurrer, has no application where the Court has simply refused, on motion, to order a return to be taken off the file; for an argument and ruling of the Court on motion, does not put the case into the same state as if there had been judgment on demurrer. (*l*) In one case, however, counsel, before filing a traverse to the defendant's return, applied for leave to take the opinion of the Court afterwards, on concilium, as to the other parts of the return, if it should be necessary, to which the Court assented, saying, it thought the application quite reasonable. (*m*)

The prosecutor may obtain time to plead, &c., as in an action on the case for a false return. (*n*.)

—.] *Rule to plead*.—One side bar rule to plead only need be given, (so that it is not necessary to give any peremptory rule); such rule may be drawn up and be served as well in Term as in Vacation, and expires in ten days after service thereof. (*o*)

—.] *Enforcing Plea*.—If the defendant have both formally and substantially answered the prosecutor's writ, it may be that the prosecutor will lie by, and will neither obtain time to plead, nor within a *reasonable time (*p*) take the necessary steps to come to an issue; [*385] the defendant therefore should, if he have not filed a rule to plead, and he be desirous to bring the matter before the Court, move, under stat. 1 Wm. 4 c. 21, s. 6, or as to Ireland, stat. 9 & 10 Vict. c. 113, s. 5, for a rule to show cause why the prosecutor should not pay the costs of opposing the issuing of the writ of mandamus and of the return, and proceed in the prosecution of the writ. The rule, if obtained, is brought on as an ordinary rule, and the Court will, after having heard it discussed, decide between the parties; if the prosecutor have not been guilty of laches, the Court will discharge the rule; but if he have, it will either make it abso-

(*j*) Per Denman, C. J., in *R. v. Payn*, 3 P. & D. 623. S. C. 11 A. & E. 955.† S. C. 9 L. J., N. S. 285, Q. B.

(*k*) Ante, p. 360, n. (*o*), 374, n. (*j*). *R. v. North Midland Railway*, 3 P. & D. 622. S. C. 2 Rail. Cas. 1. S. C. 9 L. J., N. S. 287, Q. B. S. C. 11 A. & E. 955,† n. (*b*). *R. v. Cambridge (Mayor)*, 2 T. R. 456. *R. v. London (Mayor)*, 3 B. & Ad. 255.† Burr. 2008. *R. v. York (Mayor)*, 5 T. R. 66.

(*l*) *R. v. Payn*, 3 P. & D. 623. S. C. 11 A. & E. 955,† and cases there cited. S. C. 9 L. J., N. S., 285, Q. B. S. C. 2 Rail. Cas. 1. S. C. 1 Jur. 54.

(*m*) *R. v. Manchester, &c. Railway*, 11 T. 1840. 11 A. & E. 956,† n.

(*n*) See App. stat. 9 Ann. c. 20, s. 6, extended by stat. 1 Wm. 4, c. 21, to writs of mandamus in all cases. As to Ireland, see stat. 19 Geo. 2, c. 12, s. 6, and 9 & 10 Vict. c. 113.

(*o*) Cr. Off. Rul., r. 17. See Rules, App. See ante, p. 293, n. (*w*).

(*p*) *R. v. Swansea (Corp.)*, 1 E. 24 Geo. 3, Gude's Cr. Pr. 192.

lute unconditionally, or impose terms upon the prosecutor. Thus, in a case, where on the 16th November, 1841, a rule nisi for a mandamus was obtained, which was made absolute on the 17th April, 1842, and a return filed on the 14th May following; after which the prosecutor took no further steps down to the following November, and then, upon application, refused to pay the costs of the proceedings; the Court ordered the prosecutor to pay the costs of the writ, unless by the first day of the following Term, he proceeded to traverse or impeach the legal validity of the return.(g)

—.] *Form of Plea.*—If the prosecutor wish to deny any matters of fact, falsely alleged in the return, such end is accomplished by traversing them;(r) or if he wish to confess and avoid them, that is done by a plea or pleas, ending with a verification.(s) The prosecutor may, however, traverse one part of the writ, and plead specially to the other.(t)

The statute of 9 Ann. c. 20, s. 2, provides, that such plea or traverse shall be the same as if the prosecutor had brought his action on the case for a false return.(u) As, therefore, the proceedings subsequent [*386] to the return are thus assimilated to those of a personal action, so the pleas must be framed strictly in accordance with the rules of pleading which govern the legal formulæ in such actions, in order that the defendant may be enabled to take and raise proper issues.(v) So, it has been held since the above statutes, that an admission in one plea, cannot be read in favour of, or against a particular fact alleged in another.(w) Also, that those facts of a return or other pleading, not traversed or otherwise pleaded to, are admitted.(x) And that the prosecutor is estopped from denying that the defendants are a corporation, if he so style them by the

(g) See ante, p. 306, 307. R. v. Dartmouth (Mayor), 2 D., N. S. 980. S. C. 12 L. J., N. S. 83, M. C. R. v. Swansea (Corp.), E. 24 Geo. 3, Gude's Cr. Pr. 192.

(r) 10 A. & E. 558.† S. C. 4 P. & D. 48, ante, 347. S. C. 1 Rail. Cas. 509. See tit. "Return" (Traverse), p. 348.

(s) R. v. Pembroke (Churchwardens), 5 A. & E. 603.† S. C. 1 N. & P. 69.† R. v. Brancaster (Churchwardens), 7 A. & E. 459.† S. C. 2 N. & P. 580. See ante, tit. "Return" (Confession and Avoidance), p. 347. 351—362.

(t) See stats. 9 Ann. c. 20, s. 2, and 1 Wm. 4, c. 21 (E.), and 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113 (I.), App. R. v. Darlington School, 6 Q. B. 682, 707.† S. C. 14 L. J., N. S. 67, Q. B.

(u) Com. Dig. tit. "Man." D. 6. So that all special pleas (or those in confession and avoidance), must be signed by counsel, and if it be intended to plead two or more to the same part of the return, a rule to plead several matters must be obtained. See stats. 1 Wm. 4, c. 21 (E.), 19 Geo. 2, c. 12 (I.), and 9 & 10 Vict. c. 113 (I.), App.

(v) Ante, p. 8, n. (y), 383, n. (e). R. v. Brancaster, 7 A. & E. 460.† S. C. 2 N. & P. 580. R. v. York (Mayor), 3 Q. B. 550.† S. C. 2 G. & D. 584. R. v. Todmorden (Overseers), 4 P. & D. 553. S. C. 1 Q. B. 185,† where see forms of pleas, &c. See stats. 9 Ann. c. 20, s. 2 and 1 Wm. 4, c. 21.

As to obtaining time to plead, see stat. 9 Ann. c. 20, s. 6 (E.) As to Ireland, stat. 19 Geo. 2, c. 12, s. 6, App.

(w) R. v. Smith, 1 D. & M. 578. S. C. 5 Q. B. 614.† R. v. Gaskin, 8 T. R. 210. R. v. Griffiths, 5 B. & A. 731.†

(x) R. v. London (Mayor), 9 B. & C. 20,† where see form of an entry of a traverse. S. C. 4 M. & R. 46.

direction of his writ; therefore they need not, in their return, shew what manner of corporation they are.(y)

—.] *Filing*.—If pleas have been for any cause improperly filed, a motion should be made to take them off the file.(z) As to taking pleas off the file, see ante, p. 331, 365—367.

—.] *Withdrawal of Plea*.—The practice as to withdrawal of pleas is the same as in personal actions. But upon demurrer to a plea to return, the Court refused an application to allow it to be withdrawn, in order that the question might be argued on the return.(a)

—.] *Judgment by Default*.—In case no plea, replication, rejoinder, joinder in demurrer, joinder in error, or other pleading, shall be entered on the expiration of the time limited by the rule to plead, &c., judgment as for want of such pleading may be signed at the opening of the office on the next following morning, unless any order of the Court, or of a Judge, extending such time, shall have been obtained and served, and in such case judgment shall not be signed until the day after the expiration of the time granted by such order.(b)

Judgment is signed at the Crown Office, and there entered; a roll should be obtained, and the proceedings entered thereupon, as in ordinary cases: a number must be obtained for it; after which it should be carried in, if it be intended that it shall be the foundation of ulterior proceedings.(c) The Court will, however, on an application *supported by special affidavits accounting for the delay,(d) upon terms set aside such [*387] judgment, as in the case of a personal action.

—.] *Demurrer to Prosecutor's Plea, Replication, Rejoinder, &c.*—The stat. 9 Ann. c. 20, s. 2, after empowering the person or persons suing or prosecuting the writ of mandamus, to plead to, or traverse, all or any the material facts contained within the said return, also empowers the person or persons making such return, to *reply, take issue, or demur; and such further proceedings*, and in such manner, for the determination thereof, as might have been had, if the person or persons suing such writ had brought his or their action on the case for a false return.(e)

As to allowing time to reply, rejoin, &c., see stat. 9 Ann. c. 20, s. 6, extended by 1 Wm. 4, c. 21; also, see stats. 19 Geo. 2, c. 12, s. 6, and 9 & 10 Vict. c. 113 (I.), App. and ante, p. 386, n. (v).

—.] *Rules to reply, &c.*—One side bar rule only to *reply, rejoin, join in demurrer, &c.*, need be given; which shall be drawn up and

(y) Ante, p. 319, n. (l). R. v. Halse, 1 Keb. 20. R. v. Slythe, 9 D. & R. 229.†

(z) See ante, p. 367, n. (f). R. v. London (Mayor), 3 B. & Ad. 275.† See ante, p. 365, "Return" (Filing).

(a) R. v. York (Mayor), 6 Jur. 1082.

(b) Crown Off. Rules, r. 19, App.

(c) See infra, "Entry of Proceedings," p. 395, 396.

(d) R. v. Swansea (Corp.), E. 24 Geo. 3, Gude's Cr. Pr. 192.

(e) This stat. of 9 Ann. c. 20, is extended to writs of mandamus in all cases by stat. 1 Wm. 4, c. 21, for which, together with the stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, relating to Ireland, see App.

served, (and no peremptory rule given thereon), and which rules shall, in all cases, expire in four days next after service thereof.(f)

If a replication, or rejoinder, or joinder in demurrer, be not filed in accordance with the above rule, judgment by default may be signed;(g) and damages or costs, or costs alone, as the case may be, may be obtained by writ of inquiry, or otherwise, as in an action on the case for a false return.(h)

—.] *Issue*.—Joining issue in fact, is warranted by stat. 9 Ann. c. 20, s. 2, and is thereby declared to be the same as in an action on [*388] the case for a false return;(i) except in cases within the stat. 1 Wm. 4, c. 21, s. 4, which enacts, that the Court of B. R. will direct who shall join issue, and in whose name the proceedings shall be carried on.(i) A complete copy of the issue need not be delivered, if the whole of the pleadings have been separately delivered.(j)

—.] *Notice of Trial*.—The form, &c. of the notice of trial is the same as that of such a notice in a personal action. Although by stat. 9 Ann. c. 20, s. 2, the prosecutor of a mandamus, to which there is a return, and issue taken on the facts therein alleged, may try the same in such place as an issue in an action on the case for a false return should or might have been tried, yet it has been held, that if all the material facts are alleged in one county, and issue taken thereon there, the prosecutor cannot issue the venire facias into another county, though he might originally have alleged the facts there, and have there brought his action for a false return.(k) The trial may also be had at the sittings of Nisi

(f) Cr. Off. Rules, r. 18, App. The following is a form of rule:—

“ —, the — day of —, in the — year of the reign of Queen Victoria.
(Venue).

The Queen on the prosecution of
S. B. and J. E.
agst.
J. W. and T. C.,
Chapelwardens of B.

Unless the defendants shall reply to the pleas to the return of the said defendants to this writ of mandamus, within four days next after service of this rule upon the attorney or agent for the said defendants, let judgment be entered for the said prosecutors against the said defendants for want of a replication.

Side Bar.

By the Court.”

(g) See Cr. Off. Rules, r. 19, App. See tit. “Judgment by Default,” ante, p. 386, 387, and tit. “Return” (Demurrer, Joinder).

(h) See stat. 9 Ann. c. 20, s. 2, and 1 Wm. 4, c. 21, App. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App. See tits. “Damages,” post, p. 392, and “Costs,” p. 394.

(i) See stats. 9 Ann. c. 20, s. 2, and 1 Wm. 4, c. 21, App. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App.

(j) Corn. Cr. Pr. 232.

(k) R. v. Newcastle-upon-Tyne, 1 East, 115. Com. Dig. tit. “Man.” D. 6. But see stat. 38 Geo. 3, c. 52, s. 1, App., which empowers the Court to award the venire into another county on application for that purpose.

As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App.

Prius in Middlesex, in which county the writ is issued, or at the assizes for the county where the place is situate, and the cause originated.(l)

—.] *Subpœna*.—As to subpœna for witnesses, it must, in accordance with the late rule,(m) be tested of the day on which it is actually issued. It is issued at the Crown Office. The service is the same as in personal actions.(n)

—.] *Record*.—The record is made up by the party who gives notice of trial. It must be sealed at the Seal Office, and carried in, in like manner as a nisi prius record in a personal action.(o)

*—.] *Jury Process*.—The jury process is, in general, the same as in personal actions.(p) [389]

It was always the practice of the clerks in Court at the Crown Office, to insert in the jury process the substance of the issues to be tried; but since the conduct of the proceedings has, by virtue of stat. 6 Vict. c. 20, devolved upon the attorneys of the Court of B. R. at Westminster, the issues are sometimes very shortly expressed, as thus: “*To try upon their oath the several issues joined upon the return to our writ of mandamus, directed to, &c., commanding them to, &c.*”

The writ of *Venire Facias Juratores* must be tested as of the day on which issue is joined, or if there be a continuance, on the day of the last continuance, previous to the award of the *distringas juratores*, and must be made returnable either on a day certain, or immediately, before the Queen at Westminster, either in the same, or the next Term, as occasion may require.(q)

The writ of *Distringas Juratores* must be tested as of the day of the return of the *venire facias juratores*, and must be made returnable on

(l) Gude's Cr. Pr. 187.

(m) Cr. Off. Rules, r. 3, App.

(n) Chit. Prac. 327—333.

(o) The following is a form of Nisi Prius Record, as given in Corner's Cr. Off. Forms, p. 145.

“Pleas before our Lady the Queen at Westminster of — [the Term of the return to the writ] Term, in the — year of the reign of our Sovereign Lady Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

Amongst the Pleas of the Queen Roll.

(County).

Amongst the } Some time ago, that is to say, [on the day of the Teste of the Mem-
Records of this } domus], our Lady the Queen sent to [the direction of the writ], her
Year, No.— } Writ, close in these words, that is to say:

VICTORIA, &c., [to the end of the Writ of Mandamus]. On which said — day of —, [the day of the return of the writ], in this same Term, before our said Lady the Queen at Westminster, [the party making the return] returned the said writ as follows, that is to say, [copy the return, or, when the return is on a separate Schedule, say], the execution of this writ appears by the Schedule hereunto annexed, the answer of — within mentioned, [copying the indorsement on the writ], which said Schedule is as follows, that is to say, [then copy the return as on the Schedule, and the subsequent pleadings in order. The Jury process in the same form as upon indictment with Special Issues, except that the name of the Prosecutor is inserted in lieu of that of the Queen's Coroner and Attorney].”

(p) Anon., 2 Barn. 24. Snook v. Southwood, R. & M. 429. See stats. 9 Ann. c. 20, and 1 Wm. 4, c. 21, App. See Chit. Prac. 342.

(q) See Cr. Off. Rul. r. 6, App.

a day certain in the next ensuing Term, before the Queen at Westminster.(*r*)

A special jury may be obtained as in personal actions.

—.] *Trial*.—A *trial at Bar* may be obtained as in personal actions.(*s*)

The trial at nisi prius of issues in fact in a mandamus case, does not differ from the trial of such issues in a personal action. Vivâ voce evidence(*t*) must be adduced, and must fully support the issues raised for trial; and no other issues but those raised can be tried.(*u*)

—.] *Jeofails, &c.*—By stat. 9 Ann. c. 20, s. 6,(*v*) the stat. 4 Ann. c. 16 (*Jeofails*), is extended to writs of mandamus.

[*390] *—.] *Amendments*.—The remedial stat. 9 Geo. 4, c. 15, authorizing the amendment at the trial, of variances between matters in writing or in print produced in evidence and the record, does not, in terms, embrace trials on writs of mandamus, but on the contrary would seem to exclude them.

By stat. 3 & 4 Wm. 4, c. 42, s. 23, which recites, that great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances(*w*) as to some particular or particulars between the proof and the record, and setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced; and the same cannot in any case be amended at the trial, except where the variance is between any matter in *writing*, or in print produced in evidence, and the *record*; and that it is expedient to allow such amendments, as thereafter mentioned, to be made on the trial of the cause, it is enacted: that it shall be lawful for any Court of Record, holding plea in civil actions, and any Judge sitting at Nisi Prius, if such Court or Judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such Court or Judge in any civil action, or in any information in the nature of a quo warranto, or *proceedings on a mandamus*, when any variance shall appear between the proof and the recital, or setting forth on the record, writ, or document, on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of any such Court or Judge, not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of

(*r*) See Cr. Off. Rul. r. 7, App.

(*s*) Anon., 2 Barn. 106. See Chit. Prac. 357—360, 8th edit.

(*t*) Stevenson v. Newenson, Ld. Raym. 1353; Stra. 583; 1 Doug. 83. Smith v. Armourers and Braziers' Company. Peake N. P. C. 199.

(*u*) Vaughan v. Lewis. Carth. 229.

(*v*) App. See also 1 Wm. 4, c. 21, App., and as to Ireland, see stats. 19 Geo. 2, c. 12, s. 16, and 9 & 10 Vict. c. 113, App.

(*w*) In the act this word is, by mistake, "vacancies."

the Court, or otherwise, both in the part of the pleading where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such Court or Judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such Court or Judge, not material to the merits of the case, but such as that the other party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such Court or Judge shall have power to cause the same to be amended, upon payment of costs to the other party, and withdrawing *the record, or postponing the trial, as aforesaid, as such Court or Judge shall think reasonable, and after any such amendment, the [*391] trial shall proceed; in case the same shall be proceeded with in the same manner in all respects, both with respect to the liability of the witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared. And in case such trial shall be had at Nisi Prius, or by virtue of such writ, as aforesaid, the order for the amendment shall be indorsed on the postea, or the writ, as the case may be, and returned together with the record or writ; and thereupon such papers, rolls, and other records of the Court from which such record or writ is issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any Court of Record, then the order for amendment shall be entered on the roll, or other document, upon which the trial shall be had, provided that it shall be lawful for any party that shall be dissatisfied with the decision of such Judge at Nisi Prius, sheriff, or other officer, respecting his allowance of any such amendments, to apply to the Court from which such record or writ issued, for a new trial, upon that ground; and in case any such Court shall think any such amendment improper, a new trial shall be granted accordingly on such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet.

Also by sect. 24, it is enacted: that the said Court or Judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document; and notwithstanding the finding on the issue joined, the said Court, or the Court from which the record has issued, shall, if they think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party on the conduct of the action or defence, give judgment according to the very right and justice of the case. And by sect. 25, it is enacted: that it shall be lawful for the parties in any action or information after issue joined, by consent, and by order of any of the Judges of the said superior Courts, to state the facts of the case in the form of a special case for the opinion of the Court, and to agree that

a judgment shall be entered for the plaintiff or defendant by confession, or of *nolle prosequi* immediately after the decision of the case, or otherwise, as the Court may think fit, and a judgment shall be entered accordingly.(x)

The Judge on the trial may reserve leave to move to enter a [*392] verdict *as in personal actions,(y) and a motion for that purpose may be made accordingly.(z)

—.] *Verdict*.—If either a verdict, or a judgment on demurrer, by *nil dicit*, or for want of replication, or other pleading, be given for the *prosecutor*, he shall recover damages and costs as he might in an action on the case for a false return, to be levied by *ca. sa.*, *fi. fa.*, or *elegit*; also, he shall have granted to him a peremptory writ of mandamus without delay, as may be if the return be adjudged, on “motion to quash” or “demurrer,” insufficient in law.(a)

If, however, judgment be for the *defendant*, he shall recover costs, to be levied as aforesaid; but if such judgment be against him, he shall not be liable to be sued in another action for such return.(b)

—.] *Damages*.—The stat. 9 Ann. c. 20, s. 2, (extended by stat. 1 Wm. 4, c. 21), provides as to *Damages*, that in case a verdict shall be found for the prosecutor, or judgment given for him upon demurrer, or by *nil dicit*, or for want of a replication or other pleading, he shall recover his *damages* and costs in such manner as he might have done in an action on the case for a false return, such costs and damages to be levied by *ca. sa.*, *fi. fa.*, or *elegit*.(c)

It has been held, that where a jury which had tried traverses under stat. 9 Ann. c. 20, s. 2, omitted to find damages, the Court could neither award judgment, nor direct a writ of inquiry for the purpose of assessing them, but would direct a *venire de novo*,(d) or an action for the damages might be brought; because, as by such statute, the traverses there mentioned are given in the stead of an action for a false return, and as in such action it cannot be said, that the damages are collateral, so neither can it be said, that they are collateral in a proceeding under the statute

(x) See tit. “Special Case,” post, p. 411.

(y) *R. v. St. Pancras (Parish)*, 7 A. & E. 752.† S. C. 5 D. 722.

(z) *R. v. Baldwin*, 8 A. & E. 947, 949.† S. C. 3 P. & D. 124; 3 B. & Ad. 279,† per Lord Tenterden, C. J.

(a) Com. Dig. tit. “Man.” D. 6. See also *R. v. Kelk*, 1 G. & D. 131. S. C. 1 Q. B. 660;† 2 Tidd, 997, 9th ed., citing *R. v. Glamorgan (Mayor)*, 2 Smith, 8, where poundage was held to be recoverable as in personal actions. See stats. 9 Ann. c. 20, s. 2, and 1 Wm. 4, c. 21, App. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App.

(b) Com. Dig. tit. “Man.” D. 6. See stats. 9 Ann. c. 20, s. 2, and 1 Wm. 4, c. 21, App. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App. See infra, “Damages.”

(c) As to Ireland, see stats. 19 Geo. 2, c. 12, s. 2, and 9 & 10 Vict. c. 113, s. 2, App.

(d) *Kynaston v. Shrewsbury (Mayor)*, Cas. temp. Hard. 295. S. C. Stra. 1052. S. C. 7 Bro. P. C. 396; Bull. N. P. 199, 203. *R. v. Fall*, 1 Q. B. 640.† S. C. 1 G. & D. 117. S. C. 5 Jur. 886. S. C. 10 L. J., N. S. 145, Q. B.; Com. Dig. tit. “Man.” D. 6; Bac. Abr. tit. “Man.” (K.)

for they are consequent and dependent upon the issue, and the jury are *to inquire of damages as parcel of the charge. But such doctrine has been held not to extend to a traverse under stat. 1 Wm. 4, c. [393] 21, s. 3, which extends the provisions of stat. 9 Ann. c. 20, to all writs of mandamus, and entitles prosecutors who recover on a traverse to damages and costs, whether or not they are so interested as to be entitled to sue in "*case*" for a false return.(e) But where a jury omitted to find damages on a traverse, it was held, that the Judge who tried the cause might order from his recollection the verdict to be entered on the postea for nominal damages, though the associate's indorsement on the nisi prius record, was only, "Verdict for the Crown," the entry of nominal damages in such case being quite of course, and entirely a matter of form in which the jury could not exercise any discretion.(f)

The statute 1 Wm. 4, c. 21, s. 3, like that of 9 Ann. c. 20, was not intended to interfere with the common law right of parties to damages, but its sole object was to extend the provisions of the stat. 9 Ann. c. 20, with regard to the mode of enforcing those rights.(g) Thus, by stat. 1 Wm. 4, c. 21, s. 4, it is recited, that as writs of mandamus, other than such as relate to the offices and franchises mentioned in or provided for by the stat. 9 Ann. c. 20, are sometimes issued to officers and other persons, commanding them to admit to offices, or do or perform other matters in respect whereof the persons to whom such writs are directed, claim no right or interest, or whose functions are merely ministerial in relation to such offices or matters and it may be proper that such officers and persons shall in certain cases be protected against the payment of *damages or costs* to which they may otherwise become liable, it is therefore enacted, that it shall be lawful for the Court to which application may be made for any writ of mandamus other than such as relate to the said offices and franchises mentioned in or provided for by the said act 9 Ann. c. 20, if such Court shall see fit so to do to make rules and orders, calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to shew cause against the issuing of such writ and payment of costs of the application, and upon the appearance of such other person in compliance with such rules, or in default of appearance after service thereof to exercise all such powers and authorities, and make all such rules and *orders applicable to the case as are or may be given or mentioned by or in any act passed, or to be passed during this [394] present session of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims, provided always that the return to be made to any such writ, and issues joined in

(e) 1 Q. B. 648,† supra, n. (d). See stats. App. As to Ireland, see stat. 9 & 10 Vict. c. 113, App.

(f) R. v. Fall, 1 Q. B. 636.† S. C. 1 G. & D. 117. S. C. 5 Jur. 886. S. C. 10 L. J., N. S. 145, Q. B.

(g) Fall v. R., 2 G. & D. 806. S. C. 1 Q. B. 656.† S. C. 13 L. J., N. S. 187, Q. B. As to Ireland, see stat. 9 & 10 Vict. c. 113, App.

fact or in law upon any traverse thereof, or upon any demurrer, shall be made and joined by and in the name of the person to whom such writ shall be directed, but nevertheless the same shall and may, if the Court shall think fit so to direct, be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules, and in that case such other person shall be permitted to frame the return, and conduct the subsequent proceedings at his own expense, and in such case if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person or persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of the *costs and enforcing the judgment*, as the person to whom the writ shall have been directed might and would otherwise have had. *(h)*

The recovery of damages on an issue, raised upon the return, bars an action for a false return. *(i)* Thus, by stat. 9 Ann. c. 20, s. 3, it is provided, that if any damages shall be recovered against those making the return, then that they shall not be liable to be sued in any other action or suit for making such return. *(j)*

—.] *Costs.*—By the stat. 9 Ann. c. 20, s. 2, it is enacted; that in case a verdict shall be found for the prosecutor, or judgment given for him upon a demurrer, or by nil dicit, or for want of a replication or other pleading, he shall recover his damages and *costs* in such manner as he might have done in an action on the case for a false return, such costs, &c. to be levied by ca. sa., fi. fa., or elegit; and in case judgment shall be given for the person making such return to such writ, he may recover his costs of suit to be levied in manner aforesaid.

The statute 1 Wm. 4, c. 21, s. 3, extends the provision of the stat. 9 Ann. c. 20, to all writs of mandamus, and prosecutors are thereby entitled to recover damages and costs as in an action for a false return notwithstanding they have neither private nor particular interests in the thing commanded to be done, so as to have been entitled to sue for a [*395] **false return, (k)* and the party whether prosecutor or defendant, succeeding on an issue joined upon a traverse of a return of a madamus under the above statutes, is entitled to the costs of the application for the writ, as well as the costs of the subsequent proceedings without an express rule of Court for that purpose. *(l)* Where, however, a

(h) As to Ireland, see a similar enactment, 9 & 10 Vict. c. 113, s. 3, App.

(i) See post, tit. "False Return," and stats. 9 Ann. c. 20, s. 3, and 1 Wm. 4, c. 21, App. As to Ireland, see stats. 19 Geo. 2, c. 12, s. 3, and 9 & 10 Vict. c. 113, App. See ante, p. 392, n. *(b)*.

(j) See stat. App. As to Ireland, see stat. 9 & 10 Vict. c. 113. See post, tit. "Action, &c., for False Return."

(k) Fall v. R. (in error), 2 G. & D. 803. S. C. 1 Q. B. 660.† S. C. 13 L. J., N. S. 187, Q. B. R. v. Fall, 1 G. & D. 117. S. C. 1 Q. B. 636.† R. v. St. Pancras, 2 D., N. S. 955. As to costs generally, see tit. "Costs," post. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113. See ante, p. 393.

(l) R. v. Fall, 1 G. & D. 117. S. C. 1 Q. B. 633.† S. C. 5 Jur. 887. R. v. Kelk, 1 Q. B. 660.† S. C. 1 G. & D. 127. S. C. 5 Jur. 888. R. v. Newbury (Mayor),

prosecutor has a verdict on some only of several issues raised upon traverses to a return, he is not entitled to the costs of the issues on which he has succeeded, either under stats. 4 Ann. c. 16, 9 Ann. c. 20, or R. H., 2 Wm. 4, (I.) 74, or R. H., 4 Wm. 4, 7, the return not being a pleading in the cause.(*m*)

— Judgment.—Judgment is given in pursuance of the verdict in the same manner as a judgment after verdict in a personal action.(*n*) So, it may like such a judgment be amended, quashed, &c.(*o*) A rule for judgment must not be given.(*p*)

—.] *How Signed*.—In all cases of judgments required to be signed on verdicts given at nisi prius, the postea must be produced at the Crown Office, and judgment shall in four days next after return of the distringas, or at any subsequent time be marked thereon by one of the Masters or the assistant Master, unless a rule shall have been granted non obstante veredicto, or to arrest judgment in cases wherein such rules may by the practice of the Court be obtained.(*q*) In other cases the practice is as in an action on the case for a false return.(*r*)

—.] *Entry of Proceedings, and Judgment on the Roll*.—Formerly it was not the practice to enter the proceedings on the roll, for it was not till 12 Wm. 3, that a rule of Court was made, which ordered that all proceedings in cases of mandamus should be entered of the same [*396] term they came in.(*s*) But, notwithstanding this rule, it was not usual to enter up judgment on the return of a mandamus, except in those cases in which peremptory writs issued;(*t*) so that prior to the stat. 9 Ann. c. 20, which for the first time allowed a traverse to a return, &c., such entry could be of little practical utility, but after the passing of that statute, when traverses became frequent, and a writ of error thereon could be brought, entries also became frequent, and some care was taken in framing them;(*u*) also as since the passing of the stat. 6 & 7 Vict. c. 67,(*v*) the prosecutor may demur to the return in order to test its vali-

11 L. J., N. S. 149, Q. B. S. C. 2 G. & D. 109. S. C. 1 Q. B. 751.† S. C. 6 Jur. 821.

(*m*) R. v. Malmesbury (Aldermen), 3 G. & D. 482. S. C. 3 Q. B. 577.† S. C. 6 Jur. 1107. S. C. 11 L. J., N. S. 318, Q. B. See Chit. Prac. p. 1377, 8th edit.

(*n*) R. v. Luton Roads, 1 Q. B. 860.† S. C. 1 G. & D. 250. S. C. 10 L. J. R., N. S., Q. B. 263. R. v. Malmesbury (Aldermen), 3 Q. B. 577.† S. C. 3 G. & D. 482. S. C. 11 L. J., N. S. 318, Q. B. S. C. 6 Jur. 1107.

(*o*) As to judgment on demurrer, see ante, tit. "Return" (Demurrer), p. 380.

As to judgment by default, see ante, p. 380, 386.

(*p*) See Cr. Off. Rul. r. 20, App. (*q*) See Cr. Off. Rul. r. 20, App.

(*r*) See stats. 9 Ann. c. 20, s. 2, and 1 Wm. 4, c. 21, App. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App. See ante, p. 383, n. (*e*), (*f*), 387, n. (*e*), 392, n. (*a*).

(*s*) See ante, p. 2. In R. v. Dublin (Dean), Stra. 539, 542, Fortescue, J. (temp. 9 Geo. 1), says, "entries of mandamuses are of late date; perhaps in Ireland they do not enter them yet." See form of entry of traverses in R. v. Fall, 1 Q. B. 636.† S. C. 1 G. & D. 117. S. C. 5 Jur. 887.

(*t*) Enfield v. Hills, 2 Lev. 239. See a form of entry of a judgment, 1 P. Wms. 351; 1 Q. B. 649.†

(*u*) Stra. 542, supra, n. (*s*).

(*v*) As to Ireland, see stat. 9 & 10 Vict. c. 113, s. 6, App.

dity, and bring a writ of error thereupon, so it is incumbent, that the writ, return, demurrer, &c., be entered of record as in personal actions, for upon a demurrer to a return it is enacted, by sect. 1, of such act, that the said writ and return, and the said demurrer shall be entered up on record.

—.] *How entered*.—The entry roll of the judgment should be completed in accordance with the postea by the attorney of the successful party, and when the costs are taxed, the amount of the Master's allocatur must be inserted in the roll, to which when necessary, a number will be given at the Crown Office, after which it should be carried to the inner treasury department of the Queen's Bench Office, to be there preserved amongst the records of the Court.(w) It would seem, that in accordance with the practice in personal actions,(x) the roll need not be carried in at once, but may be after any lapse of time. It must, however, be so carried in before it can be used for the purposes of evidence, or before a writ of error can be brought upon the judgment.(y)

—.] *Nunc Pro Tunc*.—When a defendant dies before judgment, leave will be, on a proper case, given to enter up judgment nunc pro tunc.(z)

—.] *As in Case of Nonsuit*.—By stat. 9 Ann. c. 20, (extended by stat. 1 Wm. 4, c. 21), it is declared: that if any material fact contained in a return to a mandamus shall be traversed, such further proceedings shall be had thereupon, as if an action had been brought *for a [*397] false return; therefore, when the case is ripe for such a step, judgment as in case of a nonsuit may be obtained.(a)

—.] *Non Obstante Verdicto*.—Judgment non obstante verdicto may be obtained, as in personal actions,(b) on behalf of either party.(c)

—.] *Motion in Arrest of Judgment*.—There may be a motion in arrest of judgment as in the case of personal actions.(d)

—.] *Motion for a New Trial*.—A rule for a new trial may be moved for misdirection, &c. as in personal actions.(e)

(w) Corner's Cr. Pr. p. 236.

(x) See Barrow v. Croft, 4 B. & C. 388.† S. C. 6 D. & R. 386.†

(y) See supra, n. (w).

(z) Snook v. Mattock, 5 A. & E. 240.† the practice on this point being identical with that in civil actions. See Chit. Prac. p. 460, 8th edit.

(a) Wigan v. Holmes, Say. 110. R. v. Scott 1 D. & L. 212. R. v. Stafford (Mayor), 4 T. R. 689; 3 T. R. 661, n. (d); and 1 T. R. 492, n. (d); 3 B. & Ad. 279,† per Ld. Tenterden, C. J. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App.

(b) See stats. 9 Ann. c. 20, and 1 Wm. 4 c. 21. R. v. Manchester Railway, 3 G. & D. 669. S. C. 3 Q. B. 533, 538,† where see form of entry; 3 B. & Ad. 279,† per Lord Tenterden; C. J. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App.

(c) R. v. Darlington School, 6 Q. B. 682, 697.† S. C. 14 L. J., N. S. 67, Q. B., where see a form of the entry.

(d) Pees v. Leeds (Mayor), Stra. 640. Buckley v. Palmer, 2 Salk. 431; stats. 9 Ann. c. 20, and 1 Wm. 4, c. 21; 3 B. & Ad. 279,† per Tenterden, C. J. And see 1 East, 555. See stats. 9 Ann. c. 20, And 1 Wm. 4, c. 21 (E.), and 19 Geo. 2, c. 12, and 9 and 10 Vict. c. 113 (I.), App.

(e) R. v. St. Pancras, 7 A. & E. 752.† See stats. 9 Ann. c. 20, s. 2, and 1 Wm. 4, c. 21, (E.), and 19 Geo. 2 c. 12, and 9 & 10 Vict. c. 113 (I.) App.

——. *Writ of Error*.—As at common law, a writ of error does not lie, except upon a judgment, or on an award in the nature of a judgment; the words, of the writ being, “*si judicium redditum sit*,” &c.,(*f*) so, it was at an early period held, not to lie to review the decisions or judgments of the Court of B. R., or Courts of the Counties Palatine, on the award of peremptory writs of mandamus, consequent upon a verdict in an action for a false return; because there was no record upon which error could be brought, it being a mere award of the writ;(*g*) and it was also held that the bringing of a writ of error in such a case, did not operate as a supersedeas to the peremptory writ.(*h*)

Afterwards, by the stat. 9 Ann. c. 20, it was enacted, amongst other things, that in certain cases therein mentioned (municipal officers), when *a writ of mandamus should issue, and a return should be made thereunto, it should be lawful for the prosecutor to plead to, or [^{*398}] traverse, all or any of the material facts contained within such return, to which the defendant might reply, take issue, or demur; and such further proceedings in such manner should be had therein for the determination thereof, as might have been had if the prosecutor has brought his *action on the case* for a false return. In such cases, therefore, where by virtue of the statute the parties resorted to pleadings, a writ of error has been held to lie, if the case were put in a proper train; because they then assumed the form of a personal action in which judgment and costs were given.(*i*). Subsequently by stat. 1 Wm. 4, c. 21, the above provision of the stat. 9 Ann. c. 20, has been extended to writs of mandamus in all other cases, and to the proceedings thereon;(*j*) and, therefore, by virtue of these statutes, error can be brought in all cases, excepting where the prosecutor avails himself of his common law remedy, by action for a false return.

Neither of the above acts of Parliament, however, gave to the prosecutor a power or authority to demur to the return of the defendant, in order that a decision upon it as to its validity could be reviewed by a Court of Error; which being deemed expedient, and that a certain mode of effecting the same should be ordained and established, it is by stat. 6 &

(*f*) Co. Litt. 288, b. Jacques v. Cesar, 2 Wms. Saund. 101, d, n. (1). R. v. York (Mayor) 6 Jur. 1082.

(*g*) Bac. Abr. tit. “Man.” 287. Dublin (Dean) v. Dowgatt, 1 P. Wms. 348. R. v. Trinity Chapel (Dean), 8 Mod. 27. S. C. Stra. 536; Fort. 329. Dublin (Dean), v. R. 1 Bro. P. C. 73, 2nd edit. R. v. Hearle, Stra. 625, 628. S. C. 3 Bro. P. C. 178. Kynaston v. Shrewsbury (Mayor), Stra. 1051. St. David’s (Ep.) v. Lacy, Ld. Raym. 539, 545. R. v. Clarke, 2 East, 79, 81. R. v. Manchester Railway, 3 Q. B. 539,† S. C. 3 G. & D. 269. But see Dr. Patrick’s case, 2 Keb. 259. S. C. Sid. 346, pl. 12.

(*h*) Bull. N. P. 200; Bac. Abr. tit. “Man.” (M.)

(*i*) See ante, p. 398, n. (*y*); 6 N. & M. 512,† n. (*b*), citing R. v. Manor, 3 N. & M. 496.† S. C. 1 A. & E. 297;† 1 Bro. P. C. 73, supra. n. (*y*); Bull. N. P. 204. See stat. App. As to Ireland, see stat. 19 Geo. 2, c. 12, App.

(*j*) See stat. App. R. v. Oundle Manor, 1 A. & E. 283, 297.† S. C. 3 N. & M. 484.† and cases there cited. S. C. 1 N. & M. 586.† See ante, p. 7, n. (*v*).

The stat. of 1 Wm. 4, c. 21, does not apply to Ireland, but its provisions have been substantively, enacted for Ireland by stat. 9 & 10 Vict. c. 113, s. 6, App.

7 Vict. c. 67, s. 1, (*k*) enacted; that the prosecutor shall impugn the validity of a return by demurring thereto, and by obtaining judgment on such demurrer.

It is also enacted by sect. 2: that whenever any such judgment shall be given, or whenever *issue in fact*, or in law, shall be joined upon any pleading in pursuance of the recited acts of 9 Ann. c. 20, and 1 Wm. 4, c. 21, or either of them, and judgment shall be given thereon by any of the Courts aforesaid, it shall be lawful for any party to the record in any such cases, who shall think himself aggrieved by such judgment, to sue out and prosecute a writ of error, for the purpose of reversing the same, in such manner and to such Court or Courts, as a party to any personal action in the said Court, may now sue out and prosecute a writ of error upon the judgment in such action; and such [*399] and the like proceedings shall thereupon be had and taken, and such costs awarded, as in ordinary cases of writs of error upon judgments of the said Courts respectively in personal actions; and if the judgments of such Court be reversed by the Court of Error, the said Court of Error shall thereupon, by their judgment, not only reverse the same, but shall also, in addition thereto, give the same judgment which the Court, whose judgment is so reversed, ought to have given in that behalf; and if by their said judgment they shall award that a peremptory writ of mandamus shall issue, the same shall and may accordingly be issued by the proper officer, in the office from which such writs issue, as the case may be, upon production to him of an office copy of the said judgment of the Court of Error, which shall be his warrant for so doing.

Provided always, that bail in error, to the amount of fifty pounds, or such other sum as may be by any rule of practice thereafter provided, shall be duly put in within four days after the allowance of the said writ; and the same shall afterwards be duly perfected, according to the practice of the Court wherein the said original judgment was given; otherwise the plaintiff in error shall be deemed to have abandoned his writ of error, and the same shall not be further prosecuted. (*l*)

It is also, by sect. 4, enacted: that the said Courts of Error may and are directed to make from time to time, and as often as they shall see occasion, such rules of practice in reference to the said application, and the proceedings thereon, and in reference to the writs of error therein mentioned, and the proceedings thereon, and the amount of bail to be taken, as the said Courts respectively may deem necessary to effectuate the intention of the act. (*m*)

(*k*) See stat. App. The provisions of the above statute have been substantively enacted for Ireland by stat. 9 & 10 Vict. c. 113, s. 6, App.

(*l*) *York Railway v. Milner*, 15 L. J., N. S. 379, Q. B., is a case of error under this stat.

(*m*) No rules have as yet been drawn up under this power, so that the practice of error in cases of mandamus is governed by the above stat. 6 & 7 Vict. c. 67, s. 2.

The course of proceedings in error on a mandamus are, as above stated, assimilated to those in error on a judgment in a personal action.⁽ⁿ⁾

—.] *Joinder in Error.*—There must be only one side bar rule to join in error, which must be drawn up and served, (and no peremptory rule given thereon;) it expires in four days next after service,^(o) and on default being made, judgment by default may be signed.^(p)

EXECUTION, WRITS OF.] If no proceedings in error, or otherwise, *which operate as a stay of execution, be taken, writs of execution for damages and costs, or costs alone, as the case may be, [*400] issue as in personal actions.

As to execution on a judgment by default, see ante, p. 386, stats. 9 Ann. c. 20, s. 2, and 1 Wm. 4, c. 21 (E.), App.; and as to Ireland, stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App.

As to execution on a judgment on a verdict, see ante, p. 392.

As to judgment on a demurrer to a return, see ante, p. 380, 381, 392.

Every writ of execution should be *tested* as of the day on which it actually issues, and may be made returnable either on a day certain in Term, or immediately after the execution thereof; and the party suing forth the same, must indorse thereon the place of abode and addition of the party against whom the same is issued, or such other description of him as such party suing out such writ may be able to give.^(q) It has been held, that cases of mandamus under stat. 9 Ann. c. 20, where the parties plead, and damages and costs are given, are actions within the statute 43 Geo. 3, c. 46, s. 5, regulating the costs of writs of execution, and the indorsements thereon.^(r)

PEREMPTORY WRIT OF MANDAMUS.] *What.*—A peremptory mandamus is not a judicial writ founded upon a record, but a mandatory writ which the Court of B. R. grants when it is satisfied of the prosecutor's right.^(s)

—.] *When granted.*—By the stat. 9 Ann. c. 20, s. 2 (extended by stat. 1 Wm. 4, c. 21, to writs of mandamus in all cases,) it is enacted: that where any mandamus shall issue to which a return shall be made, and upon issue joined thereon a verdict be found for the persons suing such mandamus, or judgment be given for them, a peremptory mandamus shall be granted without delay, as if the return had been adjudged insufficient in law.^(t)

⁽ⁿ⁾ R. v. Darlington School, 14 L. J., N. S. 67, Q. B. S. C. 6 Q. B. 682, 707.† See ante, p. 397, 398.

^(o) Cr. Off. Rul. r. 18, App.; the joinder need not be signed by counsel.

^(p) Cr. Off. Rul. r. 19; and see ante, tit. "Judgment by default," p. 386.

^(q) Cr. Off. Rul. r. 10, App.

^(r) R. v. Glamorgan (Mayor), 2 Smith, 8; Chit. Prac. 561, 562, 8th edit.

^(s) Foot v. Prowse, Stra. 698; Com. Dig. tit. "Man." D. 6.

^(t) See ante, p. 7, n. ^(w); Bac. Abr. tit. "Man." (M.) As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App.

By the subsequent act of 6 & 7 Vict. c. 67, s. 1, the prosecutor is empowered to object to the validity of a return by demurrer, upon which the Court is also empowered, if they adjudge that the return is not valid in law, to award, by such judgment, a peremptory writ shall issue, which may be sued out and issued accordingly, at any time after four days from the signing of such judgment.^(u) Also by sect. 2 of the same statute, [*401] it is enacted: that where any judgment on demurrer to a *return shall be given, or whenever issue in fact or in law shall be joined upon any pleadings, in pursuance of the acts, or either of them, recited in such act of 6 & 7 Vict. c. 67, and judgment shall be given thereon, it shall be lawful for any party to the record in any of such cases who shall think himself aggrieved by such judgment, to sue out and prosecute a writ of error; upon the determination of which the Court of Error is empowered to award a peremptory writ of mandamus, which shall and may accordingly be issued by the proper officer in the office from which such writs issue, upon production to him of an office copy of the said judgment of the Court of Error, which shall be his authority and warrant for so doing.^(v)

As in many cases it is discretionary with the Court whether it will or not grant the rule nisi for the writ, so whether or not a peremptory mandamus shall issue, is in such cases also entirely within its discretion;^(w) such discretion must be, however, honestly exercised, that is, agreeably with justice, and as the interests of the parties litigant seem to require.^(x) Thus, where there appears to be the least right for the plaintiff, a peremptory mandamus should be awarded.^(y) So the Court will direct a peremptory mandamus, though part of the return be unanswered, if such part be immaterial or afford no answer to the writ;^(z) but if such unanswered part be material, the Court will refuse the writ,^(a) because the prosecutor in such a case has no right to it; so that if it appear from the whole of the return that the prosecutor should not have a peremptory mandamus, the Court will not grant one,^(b) as where a prosecutor's right to restoration to an office has ceased by lapse of time.^(c)

(u) See ante, p. 399, also stat. in App. As to Ireland, see a similar enactment, stat. 9 & 10 Vict. c. 113, s. 6, App.

(v) See ante, tit. "Error," p. 397; also stat. 6 & 7 Vict. c. 67, App. As to Ireland, see a similar enactment, 9 & 10 Vict. c. 113, s. 7, Ap.

(w) Ante, p. 287, 288, 297. *R. v. Baldwin*, 3 P. & D. 126. *S. C.* 8 A. & E. 949.† *R. v. Griffiths*, 5 B. & Ald. 731.† *S. C.* nom. *R. v. Bristol, &c.*, 1 D. & R. 389.†

(x) See ante, p. 288, n. (y), (i).

(y) See ante, p. 9, 10. *R. v. Hull*, 11 Mod. 391. *R. v. Oxon. (Mayor)*, 2 Salk. 428. *Buckley v. Palmer*, 2 Salk. 431. *Veal's case*, Ray. 431. *R. v. Cambridge (Mayor)*, 12 A. & E. 714.† *S. C.* 4 P. & D. 294. *S. C.* 10 L. J., N. S. 25, Q. B.

(z) See ante, p. 303, n. (l). *R. v. Poole (Mayor)*, 1 Q. B. 616.† *S. C.* 1 G. & D. 728. *S. C.* 9 L. J., N. S. 231, Q. B.

(a) *Clarke v. Leicestershire Canal*, 6 Q. B. 898.†

(b) 1 D. & R. 389,† supra, n. (w). *R. v. Featherstonhaugh*, Burr. 530. *R. v. Newcastle*, Bull. N. P. 203, 207. *R. v. Campion*, 1 Sid. 44. *R. v. Axbridge, Corp.* 523; 2 T. R. 81. *R. v. Richardson*, Burr. 530, 534. *R. v. Lyme Regis*, 1 Doug. 157. *R. v. Tiddlerley*, 1 Sid. 14. *R. v. Rippon (Mayor)*, Salk. 433. *S. C.* Ld. Raym. 563. *Bassett v. Chichester*, 1 Sid. 286. *R. v. Twitty*, 7 Mod. 83, n. (a). *S. C.* 2 Salk. 434. *S. C.* Holt, 442. *Com. Dig.* tit. "Man." D. 5.

(c) See ante, p. 192, n. (c).

A peremptory writ will also be awarded if the matter of a return be *for any cause insufficient in substance.(d) So, if the return be for any cause quashed(e) or falsified, in an action for a false re-[*402] turn in the Court of B. R.,(f) or on a feigned issue.(g)

The Court will not, however, grant a peremptory writ, though the return to the writ fail, or be objectionable either in point of form or substance, if the facts stated on the return justify the Court in refusing such writ as a matter of discretion. Thus where the return to a writ to reinstate in a municipal office, disclosed that the prosecutor had been removed for non-residence, and that he had accepted another incompatible office.(h) So the Court will refuse to issue the peremptory writ in any case in which it is clear the writ, if issued, cannot have any useful effect,(i) or where the object of the writ is illegal,(j) or where the prosecutor has no title to such writ.(k) So the peremptory writ will be refused, if the writ upon which it is founded be substantially defective.(l) Thus a peremptory mandamus cannot be limited, but must be in exact accordance with the writ upon which it is founded; *so if such writ be bad, the Court [*403] will refuse to grant a peremptory mandamus thereupon.(m)

A peremptory mandamus sometimes goes by consent on withdrawal of the return by leave of the Court,(n) ante, p. 367.

(d) See ante, p. 7, n. (w), 358, 380; 3 Bl. Com. 111; Bac. Abr. tit. "Man." (M); Fitzherbert Nat. Brev. 330, E. R. v. Patrick, 2 Keb. 168, per Keeling, C. J. R. v. Liverpool (Mayor), Burr. 736. R. v. Doncaster (Mayor), Burr. 745. R. v. Ouze Bank (Commrs.), 3 A. & E. 544.† R. v. Lyme Regis, 1 Doug. 85. R. v. Oxon. (Mayor), 2 Salk. 429, 435; Com. Dig. tit. "Man." D. 5, D. 6; Stra. 559. See ante, tits. "Error," "Return" (Quashing, Demurrer).

(e) See ante, p. 369. R. v. Leicester (Mayor), Burr. 2089. R. v. York (Mayor), 5 T. R. 69. R. v. Norwich (Mayor), Ld. Raym. 1244. R. v. St. Bartholomew Parish, 2 B. & Ad. 506.† R. v. Bristol Dock, 6 B. & C. 193.† S. C. 9 D. & R. 309.† R. v. Dr. Harris, Burr. 1421. S. C. 1 W. Bl. 430.

(f) Wright v. Sharpe, 11 Mod. 175. S. C. 1 Salk. 288. S. C. Holt, 301. Buckley v. Palmer, 2 Salk. 430; Com. Dig. tit. "Man." D. 6. See stat. 9 Ann. c. 20, s. 2, and 1 Wm. 4, c. 21, App.; Bac. Abr. tit. "Man." (M.) Enfield v. Hills, 2 Lev. 238. See post, tit. "Action, &c., for False Return."

(g) R. v. Harris (Dr.), Burr. 1423. S. C. 1 W. Bl. 430. M. 24 Geo. 3, Gude's Cr. Pr. 201. See post, p. 412.

(h) See ante, p. 192, 196, 197. R. v. Bristol (Mayor), 1 D. & R. 389.† S. C. nom. R. v. Griffiths, 5 B. & A. 731,† and see R. v. Bank of England, 2 B. & A. 620;† Bull. N. P. 207.

(i) See ante, p. 15, (e), (w), (x); Bac. Abr. tit. "Man." (M.), citing R. v. Griffiths, 5 B. & A. 731.† R. v. Luton Roads, 1 Q. B. 860.† S. C. 1 G. & D. 250. R. v. Manchester Railway, 3 Q. B. 533.† S. C. 3 G. & D. 369.

(j) See ante, p. 16. R. v. St. Pancras (Parish), 3 A. & E. 541, 542. S. C. 5 N. & M. 222.†

(k) See ante, p. 27, 28, 288, 320. R. v. Tidderley, 1 Sid. 14. Basset v. Barnstable (Mayor), 1 Sid. 286. R. v. Lyme Regis (Mayor), 1 Doug. 84. R. v. Raines, 3 Salk. 233. Clarke v. Leicestersh. Canal, 6 Q. B. 898.† Basset v. Chichester, 1 Sid. 286; Bac. Abr. tit. "Man." (M.) n.

(l) See ante, p. 305, n. (g), 323, n. (t). R. v. St. Pancras, 3 A. & E. 535.† S. C. 5 N. & M. 222.† R. v. York (Mayor), 5 T. R. 73. R. v. Tidderley, 1 Sid. 14. Dr. Walker's case, Cas. t. Hard. 217. See ante, tits. "Writs" (Supersedeas), (Quashing), p. 335, 336.

(m) 3 A. & E. 535.† S. C. 5 N. & M. 222.† supra, n. (l).

(n) R. v. Barker and Others, 1 W. Bl. 352, n. (f). S. C. Burr. 1269; Com. Dig. tit. "Man." D. 6.

The granting of a feigned issue for the trial of the disputed facts, suspends an application for the peremptory writ.(*o*)

The effect of a mandamus to admit and swear in to an office, confers merely a legal, and not an actual possession,(*p*) or in other words, it is the consummation of a title, if there be one. In such cases, it neither gives a right, nor does it conclude one; it confers no title per se, but merely a legal capacity to assert one, which cannot be done until legal possession shall be given, if, therefore, the applicant have such legal possession, as that is all the Court can give him by such writ;(q) so it will in such a case refuse the writ, and leave him to his ordinary remedy;(r) for by having the legal possession, he is enabled either to defend his right, or to assert it by bringing an action in respect of powers, or things incident to such possession.(s)

In the case of a mandamus to restore to an office, the Court commands the actual restoration, and thereby gives an actual possession, and this is so, because as the applicant has once had an actual possession, it therefore restores the ancient right.(t) But one who has been removed from being a member of a corporation, and who has been restored by mandamus, cannot maintain an action for damages against the members of the corporation, who removed him by an act done in their corporate capacity, nor recover the costs of the mandamus.(u)

Strangers to a mandamus are neither bound nor estopped by a(*v*) peremptory writ of mandamus.

[*404] *——.] *Against whom granted.*—The peremptory writ, in general, issues against those who should have executed the first writ.

As to cases within the scope of stat. 1 Wm. 4, c. 21, s. 5, it is enacted, that in case the return to any writ of mandamus shall, in pursuance of the authority given by such act, be expressed to be made on *behalf* of any person, the peremptory writ shall, if it be awarded, notwithstanding the death of the officer in whose name it is made, be directed to any successor in office or right to such officer.(w)

(*o*) R. v. Dr. Harris, Burr. 1423. S. C. 1 W. Bl. 430. See post, tit. "Feigned Issue," p. 412.

(*p*) R. v. Dublin (Dean), Stra. 537, 538. R. v. Dr. Harris, Burr. 1422. S. C. 1 W. Blac. 430. R. v. Barker, Burr. 1267. R. v. Norwich (Mayor), Ld. Raym. 1244. S. C. 2 Salk. 436. R. v. Ward, 1 Barn. 381. See ante, tit. "Office" (Admission, Swearing in).

(*q*) R. v. Dublin (Dean), Stra. 541. R. v. Clarke, 2 East, 73, 79, 82, 84; Raym. 111. R. v. Serle, 8 Mod. 334, and cases there cited. R. v. Sparrow, 7 Mod. 396. Sharp v. London (City), Gilb. 259. Com. Dig. tit. "Man." (B.)

(*r*) Stra. 541, supra, n. (*p*). Patrick's case, Raym. 111. S. C. 1 Lev. 65.

(*s*) R. v. Dublin (Dean), 8 Mod. 29.

(*t*) R. v. Dublin (Dean), Stra. 538. R. v. Barker, Burr. 1267. Bassett v. Barnstable (Mayor), 1 Sid. 286. R. v. Exon (Mayor), 1 Show. 260. Com. Dig. tit. "Man." (B.) See R. v. Ipswich (Mayor), Ld. Raym. 1233. S. C. Holt, 443.

(*u*) Harman v. Tappenden, 1 East, 555. S. C. 3 Esp. 278.

(*v*) R. v. Heathcote, 10 Mod. 56. S. C. Fort. 290, and cases there cited.

(*w*) See stat. App. As to Ireland, see stat. 9 & 10 Vict. c. 113, App. See post, tit. "Abatement," p. 410.

—.] *How obtained.*—It has been shewn,(x) that at common law, if the defendant returned a legally sufficient cause why he should not execute the duty, &c. commanded by the mandatory clause of the writ, although such cause may have been false in fact, yet the Court would not try the truth of such return, upon affidavits, but in the first instance assume it to be true, and decline to proceed further upon the mandamus, which course compelled the prosecutor, if the return were false, to shew such falsity by the extraneous proceeding of an action on the case for a false return, and that if it were found by the jury to be false, the prosecutor not only recovered damages equivalent to the injury sustained, but also if such action had been brought in the Court of B. R., had awarded to him a mandamus, *peremptorily* commanding the defendant to do his duty, &c. It is therefore clear that as the proceedings on the mandamus were terminated by the return, and as the proceeding by action for a false return, was altogether collateral to the mandamus, and a *peremptory* mandamus no part of the judgment in such an action, the prosecutor could only obtain such last-mentioned writ on an application to the Court, by way of motion, supported by affidavits of the falsity of the return, and the production of the postea, &c.

By stat. 9 Ann. c. 20, s. 2,(y) which, although it introduced, as to municipal offices, a traverse, &c., to the return, yet merely directed the traverse, &c., and subsequent proceedings, to be the same as if the prosecutor had brought his action on the case for a false return; it therefore followed that as a *peremptory mandamus* did not, as we have just seen, form part of the judgment in such an action; so under this statute, the prosecutor, if he recovered a judgment, was obliged to obtain the peremptory writ on motion to the Court, supported by affidavits of the facts of his case, whereupon the act directs that such peremptory writ shall be granted to him without delay.

By stat. 1 Wm. 4, c. 21, s. 3,(yy) the enactments of the 9 Ann. c. 20, *relating to returns to the writs of mandamus therein mentioned, [*405] and the proceedings thereupon were extended to all other writs of mandamus; therefore for all cases within this clause of the statute, the prosecutor was and is obliged, after he has obtained judgment, to move the Court, as before stated, for his *peremptory* writ.

Also section 4 of the same statute, which provides for the protection of certain officers to whom writs of mandamus in certain cases are directed, against the damages or costs thereof, enacts: that if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person or persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs, and enforcing the judgment, as the person to whom the

(x) Ante, p. 6, n. (r), and see post, tit. "Action, &c., for false return."

(y) See stat. App. As to Ireland, see stat. 19 Geo. 2, c. 12, App.

(yy) See stat. App. As to Ireland, see stat. 9 & 10 Vict. c. 113. See ante, p. 6, n. (m), 383, n. (f), 393, n. (e).

writ shall have been directed, might or otherwise would have had. So that all successful prosecutors within this section are compelled to adopt the common law means of obtaining the peremptory writ, namely, by motion, supported by affidavits.

However, by stat. 6 & 7 Vict. c. 67, s. 1,(z) which ordains, that the prosecutor, in order to object to the validity of a return to a mandamus, must demur thereto, provides, that if the Court shall adjudge "that the return is not valid in law, then and in every such case they shall also, by their said *judgment*, award that a *peremptory mandamus* shall issue in that behalf, and thereupon such peremptory writ of mandamus may be sued out and issued accordingly at any time after four days from the signing of the said judgment." Therefore a prosecutor, who successfully demurs to a return, and obtains a judgment quashing it, is saved the common law inconvenience of making an application to the Court for the peremptory writ, because the Court directs it, by its judgment, to issue.

Also by sect. 2, of the same statute,(a) which provides a writ of error upon judgments upon either fact or law, in cases of mandamus, also directs, that if the Court of Error, by their *judgment*, shall award that a *peremptory* writ shall issue, the same shall and may accordingly be issued by the proper officer, in the office from which such writs issue, as the case may be, upon production to him of an office copy of the said judgment of the Court of Error, which shall be his authority and warrant for so doing. Thus, in cases of judgment for the prosecutor, on a writ of error, he is relieved from the common law inconvenience of making a separate application for such writ.

[*406] *In the above cases of demurrer to the return, and a writ of error, the enactments above set forth, shew how the peremptory writ is obtained and issued, it remains therefore to state more specifically than has been done, how such writ is obtained, when the proceedings are by motion at common law.

—.] *Motion where and when made.*—The writ must be moved for in the Court of B. R. at Westminster.(b)

After judgment for the prosecutor, a rule nisi for a peremptory mandamus is granted on motion, supported by an affidavit of the facts, and reading the mandamus, return, traverse, entry of postea, &c.(c) Four days must have elapsed after the return of the postea, because the defendant has so long to move in arrest of judgment, &c.(d)

(z) See stat. App. and ante. tit. "Return" (Demurrer), p. 375—381. As to Ireland, see a similar enactment 9 & 10 Vict. c. 113, s. 6, App.

(a) See stat. App., and also ante. tit. "Error," p. 397—399. As to Ireland, see a similar enactment stat. 9 & 10 Vict. c. 113, s. 6, App.

(b) Ante. p. 5, n. (f), 296, n. (t).

(c) R. v. Baldwin, 8 A. & E. 949.† S. C. 3 P. & D. 124; Bac. Abr. tit. "Man." (M.), n.: Skin. 669, pl. 7.

(d) Buckley v. Paine, Holt, 440. S. C. 2 Salk. 430, 431. Bac. Abr. tit. "Man." (M.), Enfield v. Hills, 2 Lev. 238.

The peremptory writ must not be moved for, nor will the Court award it, until the proceedings on the first mandamus are complete, and there is judgment upon the whole record, for it cannot be awarded on part of a record; thus where a mandamus issued, which commanded payment of two distinct sums, the return to which writ the prosecutor traversed, and the issues found for him as to one sum, and substantially in his favour as to the other, but as a rule nisi had been obtained to enter a verdict as to the latter, the Court refused to award a peremptory mandamus to enforce payment of the first sum, pending the rule as to the second.(e) So if the peremptory writ should be obtained before judgment signed, the Court, on motion, will set it aside, with costs.(f) The prosecutor need not, however, delay the motion for the peremptory writ, until the judgment shall be entered up formally.(g)

The Court will grant a peremptory mandamus, after judgment, for the plaintiff, in an action for a false return, notwithstanding a bill of exceptions was tendered at the trial; if, however, a rule for a new trial has been obtained, it is otherwise; for such a rule stops the issuing of the peremptory writ.(h) So pending a writ of error in an action for a false return, the Court will not grant a peremptory writ.(i) But if judgment *for [*407] the defendant in an action for a false return, be reversed in the Exchequer Chamber, or in the House of Lords, a peremptory mandamus will be awarded of course, without any express judgment.(j) The mere production of the postea falsifying the return, has been held sufficient to support a motion for the peremptory writ.(k) Such action for a false return must, however, have been brought in the Court of B. R., because as the peremptory writ recites the fact prout constat nobis per recordum, that cannot be said of the records of an action in another Court, of which the Court of B. R. cannot take notice.(l)

—.] *Rule Nisi and Absolute.*—The rule nisi is argued and made absolute, or disposed of as an ordinary rule.(m)

The Court will sometimes grant a peremptory writ, but restrain the issuing thereof until a particular day, in order that the Court may in the mean time consider the case more fully.(n)

(e) *Enfield v. Hills*, 2 Lev. 238. *R. v. Baldwin*, 8 A. & E. 947.† *S. C.* 3 P. & D. 124. *S. C.* 1 W. W. & H. 681. See 2 Salk. 428, 438. *Foot v. Prowse*, Stra. 697. *R. v. Lutton Roads*, 10 L. J., N. S. 263, Q. B. *S. C.* 1 G. & D. 248. *S. C.* 1 Q. B. 860.† See stat. 9 Ann. c. 20, s. 1, App.

(f) *Supra*, n. (e). *Neale v. Bowles*, 1 H. & W. 584.

(g) *Foot v. Prowse*, Stra. 697. *Com. Dig.* tit. "Man." D. 6.

(h) *Wright v. Sharpe*, 11 Mod. 175. *S. C.* 1 Salk. 288. *S. C.* Holt, 301. *Buckley v. Palmer*, 2 Salk. 439, and cases there cited. *Enfield v. Hills*, 2 Lev. 233. *S. C.* Sir T. Jon. 116.

(i) *Ruding v. Newel*, Stra. 933. *Com. Dig.* tit. "Man." D. 6. *Bac. Abr.* tit. "Man." (M.)

(j) *Foot v. Prowse*, Str. 697. *Com. Dig.* tit. "Man." D. 6.

(k) *Fall v. Reg.*, 2 G. & D. 809. *S. C.* 1 Q. B. 656.† *Foot v. Prowse*, Stra. 697, 698; 5 *Bac. Abr.* 287, "Man." (M.) *Bac. Abr.* tit. "Man." (M.)

(l) *Anon.*, 2 Salk. 428. *S. C.* *Ld. Raym.* 125, nom. *Green v. Pope*. *S. C.* *Comb.* 400. *S. C.* *Skin.* 670. *Com. Dig.* tit. "Man." D. 6.

(m) See ante, p. 295—306.

(n) *R. v. Tappenden*, 3 East, 191. *Bac. Abr.* tit. "Man." (M.)

—.] *When Writ peremptory in first Instance.*—A peremptory writ of mandamus is seldom awarded in the first instance,^(o) and never as against those, not parties to the proceedings.^(p) Thus, the Court has refused a peremptory writ to the master of college to remove A. B. &c., because they were not made parties to the first writ.^(q)

In cases of great urgency however, the Court will grant a peremptory writ in the first instance without waiting for a return. Thus, where a gaoler refused to deliver up the body of a person, who had died while a prisoner in execution in his custody, to the executors of the deceased, the Court issued a mandamus peremptory in the first instance. If in such a case the defendant have any answer to the writ it may be given, not by way of return, but in shewing cause why an attachment should not issue.^(r) Notice of the motion for the writ should be given to those against whom it is sought.^(s) So as to elections to municipal offices under stat. 6 & 7 Vict. c. 89, s. 5.^(t)

—.] *Form of Writ.*—In form the peremptory writ is the same as ^{*}the writ upon which it is founded,^(u) except that it not only has [*408] not the alternative sentence, namely, *vel causam nobis significes*, or *si ita est*, &c., or *si vobis constare poterit*, or *sicut informamur*, &c., but has the word "*peremptorily*" inserted in the mandatory clause,^(v) it therefore *peremptorily* commands the doing of the act, &c. As to whom the peremptory writ is to be directed in cases within the stat. 1 Wm. 4, c. 21, s. 5, see ante p. 313.^(w)

—.] *How issued.*—The peremptory writ is prepared and engrossed, and signed and sealed at the Crown Office, and served the same as the former writ,^(x) also if there have been a mistake in the service of the peremptory writ, the Court will allow a new one to issue.^(y)

A side bar rule may be had to return it as before mentioned,^(z) and upon an affidavit of personal service of the writ, the Court will grant an attachment for contempt, against the party or parties who have been served with the writ or copies thereof, for refusing to pay obedience to such peremptory writ.^(a)

—.] *Return.*—The Court will not hear a return to a peremptory

(o) R. v. Eye (Mayor), 9 A. & E. 676.† S. C. 2 P. & D. 348. S. C. 8 L. J., N. S. 142, Q. B.

(p) R. v. Baldwin, 8 A. & E. 949.† S. C. 3 P. & D. 124.

(q) R. v. St. John's Coll., Skin. 549.

(r) R. v. Fox, 2 Q. B. 246.† S. C. 1 G. & D. 566. nom. In re Wakefield (Bailiff). S. C. 11 L. J., N. S. 41, Q. B. S. C. nom. In re Jewison, 5 Jur. 989. See R. v. Eye (Mayor), 9 A. & E. 676.† See also In re Long, 14 L. J., N. S. 23 Q. B. S. C. 14 L. J., N. S. 144, Q. B.

(s) Anon., 1 Barn. 227.

(t) See stat. App.

(u) Ante, p. 308—331. As to direction, see R. v. Ipswich (Bailiffs), 2 Salk. 435. S. C. Ld. Raym. 1233.

(v) See ante, p. 326. R. v. St. John's Coll., Skin. 359. S. C. Holt, 436.

(w) See stat. App. As to Ireland, see stat. 9 & 10 Vict. c. 113, App.

(x) Gude's Cr. Pr. 186. See ante, p. 330, and see ante, p. 405, n. (z), 406.

(y) Lyne Regis T. 20 Geo. 3, Gude's, Cr. Pr. 191.

(z) Ante, p. 344; Gude's Cr. Pr. 186.

(a) R. v. Salop (Churchwardens), Bull. N. P. tit. "Man." p. 198; Gude's Cr. Pr. 186. See post, tit. "Attachment."

mandamus, though it state an attempt made to comply with the writ, and the causes by which it was frustrated, a return not being in general receivable to such a writ.(b) If, however, the circumstances of the case require it, the Court will quash the peremptory writ, and allow a defendant to make a return to the first writ.(c)

There should, however, be a return in the nature of a certificate, alleging that the writ has been complied with, and such a proceeding is a necessary one, and if not filed the Court will grant an attachment.(d)

—]. *Setting it aside, &c.*—If the peremptory writ have prematurely or improperly issued a rule to set it aside, or quash it with costs may be obtained on motion.(e) So, if it have been unnecessarily issued.(f)

*So, if the peremptory writ be upon the face of it bad in substance such insufficiency will form a valid answer to a rule for an attach-[*409]ment against those who have refused obedience to it.(g)

The rule to quash or set aside the writ is put into the Crown paper on a rule for a concilium, which rule should specify the day on which the case will be put into the paper for argument, and should be drawn up and served six days at least before such day if the venue be within forty miles of London, and eight days in all other cases.(h)

—.] *Amendment of Writ.*—As to amendment generally, see title *Writ (Amendment)*, *ante*, pp. 334, 335.

The Court, as we have seen, has power to and will for the purposes of justice mould the *rule* for a mandamus,(i) but cannot remould the writ after it has issued, and award a peremptory mandamus in a more limited or other form than the original mandamus, the peremptory writ must go in the terms of the original writ or not at all.(j)

(b) Holt, 446. R. v. Poole (Mayor), 1 G. & D. 728. S. C. 1 Q. B. 616.† S. C. 9 L. J., N. S. 231, Q. B.

(c) R. v. Owen, Skin. 669, cited in 5 Bac. Abr. 281, 7th edit., tit. "Man." (A.) R. v. Luton Roads, 1 Q. B. 860.† S. C. 1 G. & D. 250. See *infra*, n. (e).

(d) See *ante*, p. 346, and *supra*, n. (a); Gude's Cr. Pr. 186. R. v. Milverton (Manor), 3 A. & E. 286,† n. (d); Bull. N. P. 201.

(e) See *ante*, p. 335, 336. R. v. Baldwin, 8 A. & E. 947.† S. C. 3 P. & D. 124. S. C. 1 W. W. & H. 681. In re Long, 14 L. J., N. S. 146, Q. B. See *supra*, n. (e)

(f) Hogg v. King's Lynn (Mayor), T. 24 Geo. 3; Gude's Cr. Pr. 192. See *ante*, p. 335, 336.

(g) R. v. Poole (Mayor), 1 G. & D. 728. S. C. 1 Q. B. 616.† S. C. 9 L. J., N. S. 231, Q. B. See *post*, tit. "Attachment," and *ante*, p. 335—339.

(h) Cr. Off. Rul., r. 22, App. See *ante*, p. 335, 336.

(i) See *ante*, p. 305, n. (g), 313, n. (w), 323, n. (t).

(j) R. v. St. Paneras, 5 N. & M. 219.† S. C. 3 A. & E. 535.† See R. v. Leicester (J.), 7 D. & R. 393.† S. C. 4 B. & C. 891.† R. v. West Riding (J.), 5 Q. B. 1.† S. C. 3 G. & D. 170. S. C. 1 D. & M. 590. S. C. 12 L. J., N. S. 148, M. C.

[*410]

*CHAPTER THE EIGHTH.

OF VARIOUS PROCEEDINGS OF OCCASIONAL OCCURRENCE, AND ALSO OF
THE SUBJECTS OF COSTS AND ATTACHMENT.

HAVING treated of the ordinary proceedings of a writ of mandamus, from the commencement to the award of the peremptory writ, we now proceed to notice a few *incidents* of occasional occurrence, with which a mandamus case is sometimes varied, and also of the subjects of costs and attachment.

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ABATEMENT OF WRIT.] By stat. 9 Ann. c. 20, s. 1, it is enacted, that the prosecutor may plead to or traverse all or any of the material facts contained within the return, to which the defendant shall reply, take issue or demur, and such further proceedings, and in such manner be had therein for the determination thereof as might have been had if the prosecutor had brought his action on the case for a false return; (*k*) therefore, the rules of law and practice as to abatement by death, &c., *in [*411] cases of mandamus are the same as in personal actions. (*l*) Also by stat. 1 Wm. 4, c. 21, s. 5, (*m*) it is enacted that in case the return to any writ within the purview of that act, be expressed to be made on behalf of any person other than him to whom the writ is directed, such writ or the proceedings had thereupon, shall neither abate nor be discontinued by the death or resignation of, or removal from office of the person making such return, but the same shall and may be continued and carried on in the name of such person, and if a peremptory writ shall be awarded the same shall and may be directed to any successor in office or right to such person.

(*k*) See stat. App. As to Ireland, see stat. 19 Geo. 2, c. 12, App.

(*l*) See Chit. Prac. 1406—1409, 8th edit.

(*m*) See stat. App. As to Ireland, see stat. 9 & 10 Vict. c. 133, App.

INTERPLEADER.] The law and practice of interpleader in personal actions, are by stats. 1 Wm. 4, c. 21, s. 4, and 1 & 2 Wm. 4, c. 58, s. 8, (*u*) made applicable to cases of mandamus.

SPECIAL CASE.] The Court will, on shewing cause upon the rule nisi for the writ, by consent order such rule to be enlarged, and direct that in the meantime, the facts upon which it would have been argued shall be stated in a special case for their opinion, the decision upon which to decide whether the rule nisi shall be made absolute, or not. (*o*) So after a return, the Court will, on motion to quash the writ for insufficiency, by consent direct the facts to be stated in a special case, the result of the argument upon which to determine whether the peremptory writ shall be granted, or not. (*p*) So a verdict may be found upon a feigned issue, or upon a traverse, &c., (*q*) subject to the opinion of the Court upon a special case. (*r*)

For the preparation and conduct of a special case, see Chit. Pract. 807, 8th edit.

——.] *Costs.*—The party in whose favour the Court gives judgment on a special case, is entitled, under stat. 9 Ann. c. 20, s. 2, to such costs as he would have obtained in an action for a false return. (*s*)

*FEIGNED ISSUE.] The Court will, upon shewing cause upon the rule for the writ, by consent order the rule nisi to be enlarged, [**412*] and direct (as the cheapest and best course) that, in the meantime, the matters in dispute shall be tried by feigned issue, the verdict upon which to decide the fate of the rule. (*t*) So the Court will direct it where facts are disputed by a return. (*u*) If consent be withheld by either party, the Court will determine the rule against the party so withholding it. (*v*) A verdict may be found on a feigned issue, subject to a special case. (*w*)

(*n*) See stat. App. See Chit. Prac. 1211, 8th edit. As to Ireland, see stat. 9 & 10 Vict. c. 113, App.

(*o*) *R. v. Nene Outfall* (Commrs.), 9 B. & C. 876.† *R. v. Drake*, 6 M. & S. 116. *R. v. Baker*, 7 A. & E. 502.† *S. C. 2 N. & P. 375.* *R. v. House of Correction* (Governor), 2 N. & M. 138.†

(*p*) *R. v. London Dock*, 5 A. & E. 163.† *S. C. 6 N. & M. 390,*† where see form of case. *R. v. Stafford* (Marquis), 7 East, 521. See *infra*, n. (*u*).

(*q*) *R. v. Kelb*, 12 A. & E. 559.† *S. C. 4 P. & D. 185.* *R. v. St. Andrew's Parish*, 13 L. J., N. S. 341, Q. B.

(*r*) *Snook v. Mattock*, 5 A. & E. 239,† post, p. 412, n. (*w*). *R. v. London* (Mayor), 9 B. & C. 8.† *S. C. 4 M. & R. 54, 55.* See ante, tit. "Trial," and stat. 3 & 4 Wm. 4, c. 42, s. 25.

(*s*) *R. v. Kelb*, 1 Q. B. 607.† *S. C. 1 G. & D. 127.* *S. C. 9 L. J., N. S. 362, Q. B.* See generally as to costs, tit. "Costs," post, 415.

(*t*) *R. v. West Riding* (J.), 12 East, 117. *R. v. Paddington Vestry*, 9 B. & C. 459.† *R. v. Winchester* (Commissary), 7 East, 578. *R. v. Blooper*, Burr. 1044. *R. v. Barker*, Burr. 1269. *R. v. Cheshunt Roads*, 5 B. & Ad. 439.† n. (*q*). And see 8 A. & E. 562.† *R. v. London* (Ep.), 1 T. R. 333, 334. *R. v. Guy*, 6 Mod. 89. *Sandys v. Sandys*, 1 Q. B. 316.†

The practice as to feigned issues in cases of mandamus is the same as in ordinary cases. See Chit. Prac. 807—813, 8th edit.

(*u*) *R. v. Thames Commissioners*, 5 A. & E. 815.†

(*v*) *R. v. Bedford Level*, 6 East, 369, 370. *S. C. 2 Smith, 535.*

(*w*) *Snook v. Mattock*, 5 A. & E. 239.† *R. v. West Riding* (J.), 12 East, 117. See ante, p. 411, n. (*r*).

If a mandamus be not returned, because the mayor and others to whom it is directed are of different opinions, the Court, instead of granting an attachment, will by consent direct the right to be tried by a feigned issue.(x) But before the Court will allow a feigned issue, it will see that there is some good ground for it; it will not be granted merely for asking,(y) because it usually directs the peremptory mandamus to stay, until after the determination of the feigned issue.(z)

BILL OF EXCEPTIONS.] By virtue of the stat. 9 Ann. c. 20, extended by stat. 1 Wm. 4, c. 21, the law of "*Bill of Exceptions*," as it obtains in personal actions, is applicable to cases of mandamus;(a) but it has been held, that the mere tender of a bill of exceptions at the trial, is no cause for staying the granting of the peremptory writ after judgment for a false return.(b)

ARBITRATION.] Sometimes the matters of a rule for a mandamus are referred to arbitration, and when such is the case, the proceedings are the same as in personal actions.(c)

***AFFIDAVITS.]** It is not within the scope of this Work to treat [*413] of affidavits in general,(d) but merely to state such variations from their form in personal actions, as are necessary to render them applicable to the cases of mandamus.

—.] *When required.*—In all cases where the prosecutor is entitled to the writ ex debito justitiæ, as a mandamus to restore to an office, the Court never requires affidavits of the facts, although it is usual to have the facts deposed to; but where the application is to the discretion of the Court, it expects and requires an affidavit.(e)

—.] *How entitled.*—The affidavits for the application for the writ may be entitled, "In the Queen's Bench," but should not have any other heading as of the cause, or otherwise; for at the time the rule is moved for, there cannot be a cause in the Court : (f) after there is cause in Court, the affidavits must of course state it, and correctly. Thus, where a writ applied for by the Earl of Radnor, was directed to the trustees of a turn-

(x) Ante, p. 342, n. (g). R. v. Rye (Jurates), Burr. 798. S. C. 2 Ld. Ken. 485. Com. Dig. tit. "Man." D. 6.

(y) R. v. London (Ep.). 1 T. R. 334.

(z) See tit. "Peremptory Writ." R. v. Dr. Harris, 1 W. Blac. 431. S. C. Burr. 1429, 1423, where see form of rule. See also R. v. Dr. Hay, 1 W. Blac. 640. S. C. Burr. 2295. Bac. Abr. tit. "Churchwardens," (A.) Com. Dig. tit. "Man." (D.)

(a) See stat. App. As to Ireland, see stat. 19 Geo. 2, c. 12, App.

(b) R. v. Sharpe, 11 Mod. 175.

(c) See stats. 9 Ann. c. 20, extended by 1 Wm. 4, c. 21, App. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. 113, App. In re Palmer, 9 A. & E. 463.† S. C. 1 P. & D. 492. See Chit. Prac. 1461, 8th edit.

(d) They will be found treated at large, Chit. Prac. 1445, 8th edit.

(e) See ante, p. 287, 288, 292, 293. R. v. Cory, Holt, 439. See the several titles throughout the alphabetical series.

(f) R. v. Warwicksh. (J.), 5 D. 382. Ex parte Nohro, 1 B. & C. 267.† R. v. Hare, 13 East, 188. Kennet v. Avon Canal, 7 T. R. 451.

pike road, it was held, that an affidavit entitled "The trustees of the H. roads, on the prosecution of the Earl of Radnor," was improperly entitled, and could not be read.(g)

The rule as to entitling affidavits is this, that although affidavits in support of an application for the rule need not be entitled where there is no cause in Court, yet that affidavits in answer must be entitled in the same way as the rule is, which they are produced to oppose.(h)

—.] *Body of Affidavit.*—The matter of every affidavit must be in accordance with the facts of each case, and such facts should be stated with certainty and precision, and be sufficient in substance to support the motion.(i)

As to the substance or body of the affidavit, it is sufficient to state generally the title of the applicant,(j) his right, or the wrong for which *he seeks redress, and shew that he has complied with all the forms [*414] necessary to constitute such right.(k) It must also shew the jurisdiction of the Court, and the legal obligation of the party against whom the motion is made, to do the act, or discharge the duty,(l) and in what character it is required of him,(m) the demand and refusal, where necessary,(n) and the absence of any specific legal remedy.(o)

The Court of B. R. will presume omnia ritè acta, in pursuance of a mandamus granted, in the absence of affidavits shewing the irregularity. So that, in such a case, if the proceedings be regular, there is no need of affidavits shewing such regularity.(p)

The Court will make the rule for the writ absolute, although the affidavits on which the rule nisi is obtained, contain misrepresentation, scandal, and also suppress certain facts, if sufficient remain unanswered to shew a necessity for the writ.(q)

(g) *R. v. Harnham Roads*, 5 Jur. 408. *R. v. Great Western Railway*, 1 D. & M. 471. S. C. 5 Q. B. 597.† S. C. 1 D. & L. 874. And see tit. "Costs" (Affidavits), post, p. 415.

(h) *In re Grantham*, 4 D. & L. 427.

(i) Bull. N. P. 196. *R. v. Pickles*, 3 Q. B. 599.† *R. v. London (Mayor)*, 5 B. & Ad. 233, 237.† *R. v. Sargent*, 5 T. R. 466. *R. v. Cumberland (J.)*, 4 A. & E. 696,† n. (a). *R. v. Bateman*, 4 B. & Ad. 554.† *R. v. Jotham*, 3 T. R. 577. See the general form of an affidavit, *R. v. Merchant Taylors*, 2 B. & Ad. 115.†

(j) See ante, p. 320, 322. *R. v. Eastern Counties Railway*, 10 A. & E. 531.† S. C. 4 P. & D. 48. S. C. 1 Rail. Cas. 509. *R. v. Jotham*, 3 T. R. 577, and see *Burr*. 1265. *R. v. Frost*, 8 A. & E. 822.† S. C. 1 P. & D. 75. S. C. 1 W. W. & H. 664. *R. v. Warwicksh. (J.)*, 6 Q. B. 751.†

(k) See ante, p. 294; 3 T. R. 577, supra, p. 294, n. (a). *R. v. Bateman*, 4 B. & Ad. 754.† *R. v. Clear*, 4 B. & C. 899.† S. C. 7 D. & R. 393.†

(l) See ante, p. 322. Ex parte Duffield, 3 A. & E. 617.† *R. v. Oxford (Ep.)*, 7 East, 345; Bull. N. P. tit. "Man."

(m) See ante, p. 292, n. (m). *R. v. West Looe (Mayor)*, 3 B. & C. 683.† S. C. 5 D. & R. 590.† S. C. 2 D. & R. 181.†

(n) *R. v. Borough of St. Ives*, Bull. N. P. 195. *R. v. Bristol Railway*, 7 Jur. 233. See demand and refusal, p. 282. See each title as to any particular requisites in the affidavits.

(o) See ante, p. 294, n. (d), 323.

(p) *R. v. Nottingham Old Waterworks*, 6 A. & E. 370, 371.† S. C. 1 N. & P. 480.† S. C. 1 W. W. & D. 166.

(q) See ante, p. 303, n. (l). *R. v. Payn*, 1 N. & P. 524.† S. C. 6 A. & E. 393.†

Supplemental affidavits may be used, and frequently are; (*r*) but an omission in the prosecutor's affidavits, may be supplied by a reference to those of the defendant. (*s*)

—.] *Jurat*.—The form of the jurat is the same as that portion of an ordinary affidavit in a personal action. It has, however, been settled, that affidavits not entitled "In the Queen's Bench," and sworn before A. B., a commissioner, &c., without stating him to be a commissioner of such Court, cannot be read; but those sworn in Court, or before a Judge of the Court, though not entitled in the Court, may be read. (*t*) So when sworn before a commissioner, the jurat must contain the place where sworn, otherwise it cannot be read. (*u*)

*The affidavits need not be stamped. (*v*)

[*415] —.] *Filing*.—The affidavits should, as on motions in civil cases, be filed, and under special circumstances, or in the case of enlarged rules, the Court will name a time before which all affidavits intended to be used must be filed. (*w*) Office copies of such affidavits may be obtained at the Crown Office, on payment of 2s. 6d., if under five folios, and of 6d. per folio, if over that sum. (*x*)

Affidavits, although they have been once used and filed, may be again used, on any subsequent occasion, in the same matter, (*y*) by or against either party. (*z*) Thus, where a rule nisi is discharged, and an application in another form is made, the affidavits upon which the first rule was moved, may be used and read. (*a*)

—.] *Amendment of*.—The Court will, on motion, and a proper case shewn, allow the prosecutor to enlarge the rule for the writ until the following Term, and in the mean time to amend the title of an affidavit, on which the rule was obtained; and for that purpose to take it off the file, and reswear it on payment of costs, the defendant having leave to file affidavits in reply. (*b*)

COSTS.] *When granted*.—As to costs after verdict on a traverse to a

S. C. 1 W. W. & D. 142. The rule which prevails when a criminal information is moved for does not apply to applications for a mandamus.

(*r*) See ante, p. 295, n. (*m*). R. v. Mirehouse, 2 A. & E. 636.†

(*s*) R. v. Mein, 3 T. R. 596.

(*t*) R. v. Hare, 13 East, 188. Kennet v. Avon Canal, 7 T. R. 451. And see White v. Irving, 2 M. & W. 127.*

The rule of R. G., H. T., 2 Wm. 4, s. 6, as to swearing affidavits before the attorney in the cause, does not apply to proceedings on the Crown side of the Court of B. R.; 1 D., N. S. 865.

(*u*) R. v. West Riding (J.), 3 M. & S. 493.

(*v*) Stat. 4 & 5 Vict. c. 34, s. 1; 1 Q. B. 453, 463,† n. (*a*). S. C. 1 G. & D. 28; 1 G. & D. 728. S. C. 1 Q. B. 616.† S. C. 9 L. J., N. S. 231, Q. B.

(*w*) Chit. Prac. 1421, 8th edit. R. v. Middlesex (J.), 1 Chit. 368.

(*x*) Cr. Off. R., r. 15, App.

(*y*) R. v. Payn, 6 A. & E. 403.† S. C. 1 N. & P. 524.† And see 10 A. & E. 732,† n. (*a*). R. v. Canterbury (Archbishop), 15 East, 129.

(*z*) 6 A. & E. 403.† S. C. 1 N. & P. 524,† supra, n. (*y*).

(*a*) R. v. West Riding (J.), 1 Q. B. 629.† S. C. 1 G. & D. 198.

(*b*) See ante, p. 295, n. (*j*), (*l*). R. v. Warwicksh. (J.), 5 D. 382. And see 8 A. & E. 419.† S. C. 3 N. & P. 439.

return, under stat. 9 Ann. c. 20, s. 1, extended by stat. 1 Wm. 4, c. 21, s. 3 (*c*), see ante, p. 392, 394, 395.

As to the costs of ministerial offices, &c., in cases within the stat. 1 Wm. 4, c. 21, s. 4, (*d*) see ante p. 394.

As to costs of a demurrer to a return, under stat. 6 & 7 Vict. c. 67, s. 1, (*e*) see ante, p. 378, 380, 381.

As to costs of a writ of error, brought by virtue of stat. 6 & 7 Vict. c. 67 s. 2, (*f*) see ante, p. 389, 399.

*Notwithstanding the above statutory provisions it was found, [*416] that the subject of costs had not been provided for in many cases, among others, where the prosecutor failed to issue his writ after he had put the defendant to the expense of opposing the rule nisi, &c., it was, therefore, enacted, by stat. 1 Wm. 4, c. 21, s. 6, extended by stat. 9 & 10 Vict. c. 113, s. 5, to Ireland, for the purpose of making some further provision for the payment of costs on applications for mandamus. That in all cases of applications for any writ of mandamus whatsoever, the costs of such application whether the writ shall be granted or refused, and also the costs of the writ if the same shall be issued and obeyed, shall be in the discretion of the Court, (*g*) and the Court is thereby authorized to order and direct by whom and to whom the same shall be paid. Under the same statute as we have just seen, (*h*) the Court may also in its discretion, order third parties to pay costs including those of both writs, although it be not expressed in such return that it was made on behalf of such third parties. (*i*) Such statute, has however, been held not to apply to cases where the proceedings for the writ had commenced before such statute came into force. (*ii*).

Among the general rules which guide the discretion of the Court in granting or refusing costs are the following, viz. that costs are awarded to the successful party, unless strong grounds of exemption be shewn, (*j*) although the mandamus may have been obeyed and no return made. (*jj*)

(*c*) See stats. App. As to Ireland, see stats. 19 Geo. 2, c. 2, and 9 & 10 Vict. c. 113, App.

(*d*) See stat. App. As to Ireland, see a similar enactment stat. 9 & 10 Vict. c. 113, s. 3, App.

(*e*) See stat. App. As to Ireland, see a similar enactment stat. 9 & 10 Vict. c. 113, s. 6, App.

(*f*) See stat. App. As to Ireland, see a similar enactment stat. 9 & 10 Vict. c. 113, s. 7, App.

(*g*) See stats. App. *R. v. Oundle (Manor)*, 1 A. & E. 299, † n. (*o*). *R. v. St. Saviour's*, 7 A. & E. 948, 550. † S. C. 3 N. & P. 126. S. C. 1 N. & P. 496. † See 8 A. & E. 871, † (*a*). *R. v. West Riding (J.)*, 1 D. & M. 590. S. C. 5 Q. B. 1, 10. † S. C. 3 G. & D. 170. *R. v. Surrey (J.)*, 15 L. J., N. S. 117, M. C.

(*h*) *Supra*, n. (*g*)

(*i*) *R. v. West Riding (J.)*, 1 D. & M. 590. S. C. 5 Q. B. 1, † where see form of rule. S. C. 3 G. & D. 170.

(*ii*) *R. v. Wix (Inhabs.)*, 2 B. & Ad. 203, 204. *R. v. Hungerford Market*, 2 B. & Ad. 204, † n. (*a*), 348, n. (*a*). As to costs in general, see *Chit. Prac.* 1359.

(*j*) *R. v. Stephens*, Sir T. Jon. 177. *R. v. Eastern Counties Railway*, 2 Q. B. 578. † S. C. 11 L. J., N. S. 178, Q. B. *R. v. Newbury (Mayor)*, 1 Q. B. 751, 765. † S. C. 1 G. & D. 388. *R. v. West Riding (J.)*, 5 Q. B. 11. † S. C. 3 G. & D. 170. S. C. 1 D. & M. 590. *R. v. Newcastle (Mayor)*, 1 Q. B. 751. † S. C. 1 G. & D. 388. *R. v. Surrey (J.)*, 15 L. J., N. S. 117, M. C. (*jj*) 1 A. & E. 286, † n. (*d*).

So, if the prosecutor make an experimental motion and fail, the Court will award costs to the defendant,^(k) unless the case be a doubtful one, or one in which the decision of a Court of Law is required as a guide for future cases.^(l)

[*417] *It is also a general rule on this subject, that where the defendant by the want of fulness in his return, has to a certain extent misled the prosecutor, the Court in its discretion will not grant him the costs of his defence.^(m) Thus, where cause was shewn against a rule nisi for a writ of mandamus against churchwardens, and no objection was made, that under a local act of Parliament which was also a public one, the directors of the poor were responsible for the matter sought by the writ to be enforced, which being granted, upon the return thereto, such objection was successfully raised, the Court in its discretion refused to compel the prosecutor to pay the costs incurred antecedently to the return, because after the rule granted, reasonable grounds existed for prosecuting the writ.⁽ⁿ⁾

It is also a general rule, that where a judicial decision has been given, the party who comes forward only to defend a judgment in his favour, and which he is entitled to suppose a right one, shall not pay costs. Thus, where on the trial of a writ of inquiry under a railway act, the sheriff stopped the case on a preliminary objection, whereupon a rule having been obtained, calling on the sheriff to shew cause why a mandamus should not issue, directing him to proceed with the inquiry, &c., which notwithstanding the railway company opposed, yet the writ issued, and was obeyed, the Court refused to award the costs against the company.^(o)

Although it is a general rule, that if in moving for a mandamus the costs of the application be included, then the party so moving must run the risk of paying costs, if the rule be refused;^(p) yet in some cases, where a rule is moved with costs, the Court in discharging it will not in its discretion grant them to the successful party.^(q)

(k) See ante, p. 306. *R. v. Heywood*, 1 M. & S. 630. *R. v. Merchant Tailors' Company*, 2 B. & Ad. 130,† per Tenderden, C. J. *R. v. Bankes*, Burr. 1453. *R. v. Chester* (Ep.), 1 T. R. 396. *R. v. Harrison*, 16 L. J., N. S. 33, M. C.

(l) See ante, p. 49, n. (q). (r), 306. *R. v. Rye Harbour*, 5 B. & Ad. 1094,† n. *R. v. Oundle* (Manor), 1 A. & E. 290,† n., 299. S. C. 3 N. & M. 484,† *R. v. Thames Navigation*, 5 A. & E. 817,† *R. v. Saviour's*, 3 N. & P. 354. *R. v. West Riding* (J.), 5 Q. B. 11,† S. C. 3 G. & D. 170. S. C. 1 D. & M. 590. And see 1 T. R. 396, and 15 East, 158; 8 A. & E. 871,† (n). *R. v. Hull Railway*, 13 L. J., N. S. 257, Q. B. S. C. 8 Jur. 491. S. C. 6 Q. B. 70.

(m) *R. v. Round*, 4 A. & E. 139,† S. C. 5 N. & M. 427,† And see 6 A. & E. 406,† S. C. 1 N. & P. 524,†

(n) *R. v. St. Pancras*, 2 D., N. S. 955.

(o) *R. v. Middlesex* (Sheriff), 5 Q. B. 365,† S. C. 3 G. & D. 549. S. C. 13 L. J., N. S. 14, Q. B., citing *R. v. Bingham*, 4 Q. B. 877;† qu. whether the company, not being immediate parties to the rule, were liable to costs. But see *R. v. Surrey* (J.), 15 L. J., N. S. 117, M. C., and post, p. 419, n. (b).

(p) *R. v. Kirke*, 5 B. & Ad. 1092,† *R. v. Glamorganshire* (J.), 15 L. J., N. S. 110, M. C.

(q) *R. v. Payn*, 6 A. & E. 406,† S. C. 1 N. & P. 524,† S. C. 1 W. W. & D. 99.

A defendant is entitled to treble costs on a mandamus, if his act be a thing done in pursuance of a statute, which gives such treble costs.(*r*)

A party who has obtained a mandamus to restore him to an office, *cannot recover the costs of the application as consequential dam-^[*418]ages in an action for the amotion, indeed such an action cannot be maintained, unless it appear that the defendants were individually and maliciously active in procuring the amotion.(*s*)

——.] *Against whom—Bishop.*—See that title.

——.] *Corporation Municipal.*—The Court has in its discretion under stat. 1 Wm. 4, c. 21, s. 6, ordered the council of a borough corporation to pay the costs incident to a mandamus, and to the application for costs, notwithstanding the delay which occasioned the writ arose from a doubt on the part of the council, whether the vacancy under discussion was an *extraordinary* one, upon which point counsel had erroneously advised them.(*t*)

When the application is made against the council of a municipal corporation, the rule, if granted, should not be drawn up for payment of the costs “out of the borough fund,” notwithstanding such expenses are of right payable out of that fund.(*u*) The Court will however mould the rule nisi in this respect, and make it absolute against the defendants generally, for the Court will act on so much only of the rule as is good,(*r*) and this, although the only application for payment have specifically required payment by the council out of the borough fund.

——.] *Justices.*—When a rule or any application against justices is discharged, it is a matter of course that costs are awarded to them if cause have been shewn on their behalf, or they have been put to any expense.(*x*) If, however, the point raised be one fairly admitting of discussion, the Court will exercise its discretion as to the costs.(*x*) But where a rule nisi for a writ to justices is discharged with costs to be paid by the prosecutor, the parish which appeared to support the refusal of the justices is not entitled to costs under the above principle, although served with the rule nisi, notwithstanding the justices did not appear by counsel.(*y*)

——.] *Inhabitants.*—Where a mandamus is obtained against the

(*r*) R. v. Kelk, 1 G. & D. 127. S. C. 1 Q. B. 660.† S. C. 5 Jur. 888.

(*s*) Harman v. Tappenden, 3 Esp. 278. S. C. 3 Esp., 278, ante, p. 403.

(*t*) R. v. Cambridge (Mayor), 4 Q. B. 801.† S. C. 14 L. J., N. S. 82, Q. B.

(*u*) 4 Q. B. 801.† supra, n. (*t*). As to what payments the borough fund is chargeable with, see R. v. Leeds (Mayor), 4 Q. B. 796.† and cases there cited.

(*v*) 4 Q. B. 805.† supra, n. (*t*). Ex parte Turner, 1 W. W. & H. 305.

(*w*) See ante, p. 49, n. (*q*). R. v. Devon (J.), 1 Chit. 38.† R. v. Worcester-shire (J.), 2 B. & A. 233.† per Abbott, C. J. R. v. Mirehouse, 2 A. & E. 644.† S. C. 4 N. & M. 394.† R. v. Greame, 2 A. & E. 618.† R. v. Dyer, 2 A. & E. 614.† S. C. 4 N. & M. 550.† R. v. Stafford (J.), 5 N. & M. 100.† per Denman, C. J. S. C. 3 A. & E. 425.† R. v. Mills, 2 B. & Ad. 581.† R. v. Hughes, 3 A. & E. 432.† S. C. 5 N. & M. 94.† See post, p. 419, n. (*b*).

(*x*) 2 A. & E. 606.† S. C. 4 N. & M. 550.† supra, n. (*w*). R. v. Cambridge (J.), 4 N. & M. 438.† S. C. 2 A. & E. 370.† See ante, p. 49, n. (*r*).

(*y*) R. v. Staffordsh. (J.), 1 D. 507. R. v. Monmouthsh. (J.), 1 B. & Ad. 895.† And see stat. 1 Wm. 4, c. 21, s. 6, App.

[*419] *inhabitants of a parish, &c., the Court will make the rule for costs absolute, against those only who have caused the costs. Thus, where, a return by inhabitants was quashed, the Court in granting the costs ascertained which of the inhabitants joined in making the return, and made the rule for costs absolute against them only.(z) The Court will, on a proper case, order churchwardens, &c., as such to pay the costs, but not to be personally liable.

—.] *Officers, &c.*—Where public functionaries, such as clergymen, schoolmasters, &c., endowed under an act of Parliament, are obliged to come before the Court for a mandamus to obtain their dues under the act, the Court will award costs to them.(a) So, where a public officer has decided as the Court thinks rightly, it is proper to, and the Court will give him his costs, for if an officer, required by law to pronounce a decision, be brought before the Court by a motion impugning such decision, the general rule is, that he shall have his costs if the application fail.(b)

Officers, whose functions are merely ministerial, are protected by stat. 1 Wm. 4, c. 21, s. 4, against the payment of costs and damages in certain cases where writs of mandamus are directed to them.(c)

—.] *How obtained*—*Motion*.—Before the stat. 1 Wm. 4, c. 21, s. 6, no application for costs was necessary where there was a successful action for a false return, or where a traverse was taken and found for the prosecutor, because under stat. 9 Ann. c. 20, s. 2, the costs of obtaining the writ were included either in the costs of the action, or in those of the traverse, on the granting of the peremptory writ.(d) But as there were no means of giving costs to the prosecutor, where for instance the writ was obeyed, or where the return was quashed, or to the defendant when the return was held good, these cases were provided for by the former statute, s. 6;(e) therefore, in such cases the costs are obtained by a distinct motion to the Court,(f) they having been previously demanded.(g)

(z) *R. v. St. Saviour's*, 3 N. & P. 126, 354. S. C. 1 N. & P. 496.† S. C. 7 A. & E. 925.† And see 5 Q. B. 13.†

(a) *R. v. St. Saviour's Parish*, 3 N. & P. 345. S. C. 7 A. & E. 925.†

(b) *R. v. Bridgenorth (Mayor)*, 2 P. & D. 318. S. C. 10 A. & E. 70.† *R. v. Oxford (Mayor)*, 1 N. & P. 479.† S. C. 6 A. & E. 349,† ante, p. 417, n. (o).

(c) See ante, p. 342, 343. See stats. App. As to Ireland, see stat. 9 & 10 Vict. c. 113, App.

(d) See ante, p. 404, 405.

(e) See stat. App. See ante, p. 405. *R. v. Fall*, 1 Q. B. 650, 651.† S. C. 1 G. & D. 117. S. C. 5 Jur. 887. As to Ireland, see stat. 19 Geo. 2, c. 12, App.

(f) *R. v. St. Pancras*, 2 D., N. S. 955. See 3 A. & E. 286,† (d). See 8 A. & E. 871.† S. C. 1 P. & D. 172. *R. v. Wix (Inhabs.)*, 2 B. & Ad. 197, 203.† See form of rule, 2 A. & E. 370.† S. C. 4 N. & M. 438;† 7 A. & E. 948.† S. C. 3 N. & P. 126. S. C. 1 N. & P. 496.† Ex parte Davies, 5 B. & Ad. 1091,† n. (a). *R. v. Kirke*, 5 B. & Ad. 1089, 1094,† n. (a); 2 B. & Ad. 204,† n. (a), 348, n. (a). *R. v. Thames Commissioners*, 8 A. & E. 905.†

(g) *R. v. Scott*, 1 D. & L. 212. See ante, p. 418, n. (r), post, p. 420, n. (i), and tit. "Demand and Refusal."

*— *Affidavits in support of Motion.*—The affidavits in support of the motion should shew what has been done on the writ, [*420] for a return may have been made, and till the result of the whole proceeding is before the Court, there are no proper means whereby to ascertain whether or not the case be a fit one for costs. (*h*) The affidavits should also shew that the costs were demanded before the motion made. (*i*)

The Court will in deciding upon the application, refer for its guidance to the affidavits filed in support of the application for the writ, if it be clear that both applications are made between the same parties; (*j*) the applicant cannot however refer to such affidavits, unless the rule for costs be drawn up on reading such affidavits, as it would be very embarrassing to those shewing cause, if a rule could be supported by affidavits, of which no notice has been given. The practice upon this point (*k*) is settled by a rule of Court of Easter Term, 1843, by which it is ordered, that in every case in which the Court shall grant a rule for the payment of costs incurred by the application, for any writ of mandamus, or the proceedings thereon, or to compel any person not a party to an original rule, to pay the costs of such original rule, such rule for costs shall be drawn upon reading all the affidavits filed in support of and in opposition to the original rule. (*l*)

If the affidavits be defective, the Court will dismiss the application, but if the rule be discharged on the ground that the affidavit on which it was moved was defectively entitled, or the jurat defective, the Court will hear a fresh application, but not where the defect of form is in the body of the affidavit. (*m*) Thus, where such an affidavit was wrongly entitled “The Queen *against* The Directors of the Great Western Railway Company,” instead of “The Queen *v.* The Great Western Railway Company,” and also at the beginning recited, that a mandamus had been obtained “against the directors of the company,” whereupon the rule had been discharged, the Court refused to hear a fresh application, shewing no ground of application which might not have been presented before, the same affidavits being used with these defects *amended; (*n*) for a second motion, for costs cannot be made on affidavits corrected [*421] in the title and body as to the description of the defendants, though not altered in any other material respect.

(*h*) R. v. Bingham, 4 Q. B. 877.† See R. v. Thames Commissioners, 8 A. & E. 901,† n. (*b*).

(*i*) R. v. Scott, 1 D. & L. 212.

(*j*) R. v. Kirke, 5 B. & Ad. 1089, 1093.† See ante, p. 415, n. (*y*).

(*k*) R. v. St. Peter's Coll., 1 Q. B. 314.† R. v. Kirke, 5 B. & Ad. 1089.† being referred to by the officers of the Court, which the Court said came on late on the last day of Term, and was not much considered.

(*l*) 4 Q. B. 653,† infra, n. (*o*).

(*m*) See ante, p. 294, 295. R. v. Great Western Railway, 1 D. & M. 471. S. C. 5 Q. B. 597.† S. C. 1 D. & L. 874. R. v. Harnham Roads, 5 Jur. 408. R. v. Warwicksh. (J.), 5 D. 382. R. v. Manchester Railway, 8 A. & E. 413, 427.† S. C. 3 N. & P. 439. R. v. Deptford Pier, 8 A. & E. 910, 917.† S. C. 1 P. & D. 128. For the form of affidavits in general, see tit. “Affidavits,” ante, p. 413—415.

(*n*) 1 D. & M. 471. S. C. 5 Q. B. 597.† S. C. 1 D. & L. 864, supra, n. (*m*).

—.] *Rule Nisi, Form of.*—But by the rule E. T., 1843.(o) It is ordered that in every case in which the Court shall grant a rule for the payment of costs, occasioned by the application for any writ of mandamus, or the proceedings thereon, or to compel any person not a party to an original rule, to pay the costs of such original rule, such rule for costs shall be drawn up on reading all the affidavits filed in support of and in opposition to the original rule.(p)

—.] *Security for Costs.*—Security for costs may be obtained in mandamus cases as in personal action, but the Court will not compel an interested relator in a mandamus to give security for costs on the ground of his poverty, or that other persons have induced him to apply for the writ.(q)

—.] *Formâ Pauperis.*—The Court upon a proper case made, will allow the prosecutor to prosecute the writ in formâ pauperis.(r)

—.] *Taxation.*—The costs are taxed at the Crown Office by the Queen's coroner and attorney or Master in the Crown Office, on an appointment made for that purpose, which is obtained at the Crown Office, no allocatur is given, but the amount, when ascertained, is inserted in the judgment roll.(s)

ATTACHMENT.] *Nature of.*—Any contempt of Court is punishable by attachment; and the neglect of a mandamus, as by not making a return to it has been by many authorities declared to be such a contempt.(t)

The attachment which issues for not returning a mandamus is, as before stated, a writ on contempt, in nature of an execution, and so not bailable by [*422] the sheriff; therefore, if the sheriff should in such a *case, take bail, it is a misdemeanor for which an attachment will be granted against him.(u)

—.] *When granted.*—If no return be made, the Court will, on affidavit of personal service of the writ, without a rule to return it, grant an attachment.(v) Where the service has not been personal, a side bar

(o) 4 Q. B. 653,† supra, n. (l).

(p) Ante, p. 430, n. (l).

(q) R. v. Malmesbury (Mayor), 9 D. 359. S. C. 5 Jur. 366. S. C. 10 L. J., N. S. 129 Q. B. See Chit. Prac. 1230. A mandamus may be sued out in forma pauperis, 9 D. 359, infra, n. (r).

(r) Dr. Free v. St. John's Coll., cited 9 D. 361. See Chit. Prac. 1121, 8th edit.

(s) Corn. Cr. Prac. 99. See ante, tit. "Judgment," p. 395, 397.

(t) R. v. Heathcote, 10 Mod. 56. R. v. Rye (Mayor), Burr. 798. R. v. Wix (In-habs.), 2 B. & Ad. 203.† There were formerly two sorts of attachment upon a mandatory writ, viz., one which punished the contempt which was awarded on the neglect of an alias writ, and the other, which entitled the party to his action for damages, which was granted for delaying the execution of the pluries writ. Anon., 12 Mod. 161. Anon. 12 Mod. 348.

As to the general practice of attachments, see Chit. Prac. 1516, 8th edit.

(u) R. v. Baskerville, Bac. Abr. tit. "Man." (H.)

(v) Ante p. 6, n. (o), 344, n. (d). R. v. Oxford (Mayor), Palm. 451, the Court also fined the Mayor 5*l*. See R. v. Evesham (Corp.), Kel. 144. R. v. Heathcote, 10 Mod. 56. R. v. Rye (Mayor), Burr. 798. S. C. 2 Ld. Ken. 468. R. v. Wix (In-habs.), 2 B. & Ad. 203.† Bac. Abr. tit. "Man." (H.)

rule(*w*) to return the writ must have been obtained, and personally served upon the defendant, upon which, if disregarded, an attachment may be obtained.

At common law the general practice was, that if no return were made to a mandamus, the Court would usually award an alias and pluries, but on default of a return to the pluries, the Court, on production of an affidavit of service, granted an attachment without hearing counsel to excuse the contempt.(*x*) The Court would, however, usually grant a little time, viz. two or three days, for the return of each writ.(*y*) After the passing of stats. 9 Ann. c. 20, s. 1, and 11 Geo. 1, c. 4, s. 9, and 1 Wm. 4, c. 21, which directed that the first writ of mandamus, in all cases, should be returned; a neglect so to do rendered the defendant liable to an attachment, although in practice it was not granted without a peremptory rule to return the writ.(*z*)

So, an attachment will be granted, if a frivolous return be made.(*a*) So, if the defendant contemptuously make an insufficient return. Thus, if upon the disallowance of one return, a second bad one be made, the Court will grant an attachment.(*b*)

So, if the peremptory writ be not obeyed, an attachment may issue.(*c*) Thus, where the defendants had evaded signing a poor's rate, in obedience to a writ of mandamus, by keeping out of the way *so as not to be served with the writ, an attachment was granted for the con-^[*423]tempt.(*d*)

—.] *How obtained*—*Motion*.—The writ is obtained on motion, supported by the necessary affidavits. There must be an affidavit or affidavits of service of the writ, or copies thereof; although the Court will, in its discretion, enlarge the rule a few days, to admit of such affidavit of service.(*e*) Where the writ is served on all those to whom it is directed, and where an attachment is desired against all of them, it is enough to produce an affidavit of service at the time of shewing cause upon the attachment, if the other side call for it. But where the writ is not served upon all, and an attachment is sought only against those who have

(*w*) Cr. Off. Rul. r. 13, App. See ante, p. 344, 345. The more usual practice is, however, to sign judgment by default. See ante, p. 386, 387.

(*x*) See ante, p. 333. *R. v. Thetford* (Mayor), 6 Mod. 25. *R. v. Winton*, 5 T. R. 89. *Anon.* 2 Salk. 434. *R. v. Oxford* (Mayor), Palm. 455; Com. Dig. tit. "Man." D. 6; Bull. N. P. 203. Sometimes an attachment was granted for not returning the first writ. Comb. 234. See ante, p. 344, 345.

(*y*) Per Holt, C. J., 6 Mod. Ca. 25; Com. Dig. tit. "Man." D. 6. *Anon.* 12 Mod. 164. *R. v. Owen*, Skin. 669.

(*z*) Ante, p. 333, 344, 345. *Mayor of Coventry's case*, 2 Salk. 429; 6 Mod. Cas. 25; Skin. 669; Palm. 455.

(*a*) See ante, p. 352, n. (*r*). *R. v. Robinson*, 8 Mod. 366.

(*b*) Bull. N. P. 197, 198. *Anon.* 12 Mod. 410. *S. C. Nom. Lord v. Francis*, Holt, 170, 171.

(*c*) Ante, p. 408. *R. v. Poole* (Mayor), 1 G. & D. 728. *S. C. 1 Q. B.* 616.† *S. C.* 10 L. S., N. S. 198, Q. B.

(*d*) *R. v. Edwards*, 1 W. Blac. 636. *S. C. Burr.* 2105. See also *R. v. Wheeler*, 1 W. Blac. 331. *R. v. Elkins*, 1 W. Blac. 640. See Bac. Abr. tit. "Attachment."

(*e*) See ante, p. 344, 345, 346. *R. v. Esham* (Mayor), 2 Barn. 265. The affidavit should be correctly entitled. See ante, tit. "Affidavits," 313, 315.

been served, it has been held, that they ought to have an opportunity of answering such affidavit of the special service, and, therefore, it should be produced on moving for the rule.(f)

The affidavit of service should identify the defendants to be those who should return the writ, or it will be insufficient.(g)

—.] *Rule Nisi*.—The rule is an ordinary one, and nisi in the first instance.

—.] *Shewing Cause*.—Any substantial objection to the validity of the writ may be taken, on shewing cause against the rule for an attachment; for such an objection, if it had been previously brought to the knowledge of the Court, must have prevailed, so, the Court is bound to abstain from enforcing performance of such writ; therefore, an attachment cannot issue if the writ be vicious, as for instance, if it be misconceived in its most important clause, the mandatory part.(h) But an objection that the writ does not contain the clause “*vel causam nobis significatis*,” is one of which the Court, before return made, will not take cognizance.(i) So, where it was objected that the affidavit of service was not filed, the Court overruled the objection.(j)

The rule is made absolute or discharged, as in ordinary cases.(k)

If the affidavits upon which the rule for the attachment is granted, be [*424] substantially defective, the defendants may move to discharge such *rule, though no cause was shewn against it.(l) But if the rule be properly obtained, the Court will seldom discharge it, except upon payment of costs.(m)

—.] *Form of Writ; Defendants*.—In all cases, other than corporation cases, the attachment will be granted against all those, if more than one, to whom the writ is directed; though when they are before the Court, the punishment will be proportioned to the offence of each.(n) So, when an office is filled by two, who in law make but one officer, as the sheriff of Middlesex, the attachment must be granted against both, though one alone be morally guilty of the contempt. Thus, where a mandamus was directed to two bailiffs, and no return was made, the Court granted an attachment against both; though affidavit was made, that one was willing to make a return, but could not, because the other had got the writ into his hands, and would not relinquish it. The Court, in giving judgment, said, they were both to be considered as one officer, and that it

(f) *R. v. Esham* (Mayor), 2 Barn. 265.

(g) *R. v. Newcastle-upon-Tyne* (Corp.), 1 Barn. 385.

(h) *R. v. Poole* (Mayor), 1 G. & D. 732. S. C. 1 Q. B. 616,† per Ld. Denman, C. J. S. C. 10 L. J., N. S. 198, Q. B. See Chit. Prac. 1523, 8th edit.

(i) *R. v. Owen*, Skin. 669. See ante, p. 326.

(j) *R. v. Evesham* (Corp.), Kel. 244.

(k) *R. v. Somerset Sewers* (Commissioners), 7 East, 70. See Chit. Prac. 1523, 8th ed. See ante, tit. “Application” (Rule), p. 301, 307.

(l) *R. v. Newcastle-upon-Tyne* (Corp.), 1 Barn. 385.

(m) Gude’s Cr. Pr. 185.

(n) *R. v. Poole* (Mayor), 1 G. & D. 729. S. C. 1 Q. B. 616;† Bull. N. P. 201. See 6 Mod. 152; Bac. Abr. tit. “Man.” (H.) As to form of writ in general, see Chit. Prac. 1523, 8th edit.

would be endless to try in all cases which was in the right. (*o*) In the case of a municipal corporation, however, the attachment will be granted against those particular individuals only who refuse to execute the writ; and, therefore, they alone must be named in the rule for the attachment. (*p*)

The writ of attachment must be tested and made returnable on a day certain in Term before the Queen at Westminster; it must also be signed at the Crown Office, (*q*) and afterwards sealed. (*r*)

As to the manner of executing an attachment, see Chit. Prac. 1523, 8th edit.

*CHAPTER THE NINTH.

[*425]

OF THE COLLATERAL PROCEEDINGS BY WAY OF ACTION, OR CRIMINAL INFORMATION FOR A FALSE RETURN TO A WRIT OF MANDAMUS.

HAVING in the preceding pages shewn how a return to a writ of mandamus when legally insufficient, may be invalidated by "Motion to Quash," (*a*) or "Demurrer," (*b*) and also how, since the stat. 9 Ann. c. 20 (extended by stat. 1 Wm. 4, c. 21, (*c*)), the truth of a return in point of fact may be impeached by a "Plea," either by way of "Traverse," (*d*) or "Confession and Avoidance," it is proposed in the present Chapter to treat both of an "Action on the Case, and a Criminal Information for a False Return," which at common law were, as we have seen, (*e*) the only formulæ whereby the validity of such a return in point of fact could be tried by a jury.

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We now come to treat of those legal formulæ which, at common law,

(*o*) R. v. Bridgnorth (Bailliffs), 1 Barn. 53. S. C. Stra. 808; Bull. N. P. 201; Com. Dig. tit. "Man." D. 6; Bac. Abr. tit. "Man." (H.)

(*p*) R. v. Poole (Mayor), 1 G. & D. 728. S. C. 1 Q. B. 616.† S. C. 9 L. J., N. S. 231. Q. B.; Bull. N. P. 197, 198, 201; Anon. Comb. 327.

(*q*) Cr. Off. Rul. r. 4, App.

(*r*) See tit. "Writ" (Issuing), ante, p. 330, also Chit. Prac. 1523, 1524, 8th edit., and cases there cited.

(*a*) See ante, p. 369, 372—375.

(*b*) See ante, p. 369, 375—381.

(*c*) See stats. App. As to Ireland, see stats. 19 Geo. 2, c. 12, and 9 & 10 Vict. c. 113, App.

(*d*) Ante, p. 385, n. (*r*).

(*e*) Ante, p. 6, n. (*g*), (*r*), 383, n. (*a*).

were the only proceedings which the prosecutor could adopt, if the return, though legally sufficient, yet was false as to the facts upon which such sufficiency was founded; in order to fully understand which, it will be necessary shortly to premise some few observations upon the legal history of this portion of our subject.

At common law, it will be remembered, *(f)* a return to a mandamus [*426] **was not traversable; (g)* because, as it by "filing" became a record, *(h)* the prosecutor was not allowed to aver against the truth of it: *(i)* the practical effect of which doctrine was, that if the return were good in law upon the face of it, though false in fact, the prosecutor was denied all relief by the further prosecution of his writ, because he was estopped by the return; so that the only course left open to him for the wrong done him by the defendant of thus ousting him of his remedy by mandamus was, that he could maintain against him an action on the case, *(j)* called an "action for a false return," which in form and effect was no other than the ordinary action for a false return, to which sheriffs and other ministerial officers are subjected, when they by a false return to ordinary judicial writs, &c., work an injury to another's estate. The prosecutor could not, however, avail himself of this common law remedy of an action, (or criminal information for a false return,) *(j)* until the Court had upon argument adjudged the return to be sufficient in law, and such judgment had been formerly entered up; because the prosecutor could not be prejudiced by an invalid return, as he might proceed to quash it; also, if previously to such a judgment, an action were commenced, and a verdict and damages recovered, for instance, for a loss of office, and the prosecutor afterwards succeeded in invalidating the return upon argument, as before stated, he would thereupon be restored to his office, and also retain the damages recovered in the action for the loss of his place: *(k)* therefore, the prosecutor was, and still is obliged to aver in his declaration, that the return has been held to be, and is sufficient in law.

The common law being therefore so oppressive, dilatory, and expensive, as almost to render the proceeding by mandamus worthless, the attention of the Legislature was at length drawn to the subject, and by the passing of the remedial stat. of 9 Ann. c. 20, *(l)* a remedy for the grievance was provided, but in the cases of municipal offices only; which statute, after reciting that persons who have a right to *the office of mayors, or other offices* within cities, towns corporate, boroughs, and

(f) Ante, p. 6, n. *(q)*. *(r)*, 383.

(g) 5 N. & M. 427, † n. *(a)*. R. v. Holmes, Burr. 1644. See ante, p. 383.

(h) See ante, p. 365, n. *(u)*.

(i) R. v. Round, 4 A. & E. 139, † S. C. 5 N. & M. 427, † n. *(a)*. And see Bagg's case, 11 Rep. 99, b.; Com. Dig. tit. "Man." D. 6. Rich v. Pilkington, Carth. 171; Bull. N. P. 198; Bac. Abr. tit. "Man." (L.)

(j) Or a criminal information, if the circumstances warranted it. See post.

(k) See ante, p. 383. Enfield v. Hills, 2 Lev. 236, 238. S. C. Sir T. Jon, 116. R. v. London (Mayor), 3 B. & Ad. 276, 279, † R. v. London (Mayor), 5 B. & Ad. 233, † Com. Dig. tit. "Man." D. 6.

(l) See stat. App. As to Ireland, see stat. 9 & 10 Vict. c. 113, App.

places, or to be *burgesses* or *freemen* thereof, have either been illegally turned out, or have been refused to be admitted thereto, and have no *other remedy to procure themselves to be admitted or restored, [*427] than by writs of mandamus, the proceedings on which *are very dilatory and expensive*—enacted: that the persons prosecuting such writ may *plead* to (that is, may confess and avoid,) or *traverse*, all or any of the material facts contained within the return, to which the persons making such return, shall reply, take issue, or demur, and such further proceedings, and in such manner, shall be had therein for the determination thereof, as might have been had if the persons suing such writ had brought their *action on the case* for a false return; and if any issue shall be joined on such proceeding, the persons suing out such writ shall try the same in such place, as an issue joined in such action on the case should have been had; and in case a verdict shall be found, or judgment given for them upon demurrer, or by *nihil dicit*, or for want of a replication, or other pleading, they shall recover damages and costs, and a peremptory writ of mandamus shall be granted without delay for them for whom judgment shall be given, as might have been if such return had been adjudged *insufficient*; and in case judgment shall be given for the persons making such return, they shall recover costs, such damages and costs to be levied by *ca. sa.*, *fi. fa.*, or *elegit.*(*m*) By this statute, therefore, a power in certain cases to plead to, or traverse the return, was conferred upon the prosecutor: so that in those cases to which such statute referred, the proceedings, by being assimilated to the common law *formulae* of a personal action, became at once transformed from their once oppressive, dilatory, and expensive condition, to one of great efficacy, despatch, and inexpensiveness.

The cases which alone were within the purview of the above statute, and as to which it conferred the valuable privilege of traversing, or of confessing and avoiding the return, appears to have been limited only to the particular cases of the admission or restoration to certain municipal offices;(*n*) so that to the mass of the subjects of mandamus that statute does not extend; therefore, the proceedings as to them remained after that statute as they did before such statute, that is, according to the course of the common law.(*o*)

The effect which this highly remedial statute was intended to, and did produce, was evidenced by the immediate increase in the number of applications for the writ which were made to the Court of B. R., not only in cases to which such improved *formulae* was applicable, but also in those which were still subjected to the dominion of the common law; whereupon the Legislature, with the view of extending the provisions of the above stat. of 9 Ann. c. 20, and of rendering the *practical *formu-* [*428] *læ* of the writ in all cases uniform, by stat. 1 Wm. 4, c. 21, s. 3, which recited, that the provisions of the act 9 Ann. c. 20, relating to the

(*m*) 5 N. & M. 427,† n. (*a*).

(*n*) 5 N. & M. 427,† n. (*a*)

(*o*) Bull. N. P. 204, cited in 5 N. & M. 427,† n. (*a*).

writs of mandamus therein mentioned, had been found useful and convenient, and the same ought to be extended to the proceeding on other such writs—enacted: that the several enactments contained in the said statute, relating to the returns to writs of mandamus, and the proceedings on such returns, and to the recovery of damages and costs, should be, and the same were thereby extended and made applicable to all other writs of mandamus, and the proceedings thereon.(p) The effect of which enactment is, that the prosecutor of a writ of mandamus in any case may now plead to, or traverse the return, and, therefore, speedily try his right upon the merits, as in a personal action, without having recourse to the circuitous and collateral proceedings of an action, or information for a false return; and as s. 3, of the latter statute, provides: that if any damages shall be recovered against those making the return, then that they shall not be liable to be sued in any other action or suit for making such return,(q) it is clear, that the prosecutor cannot take both courses, so that the more efficacious one introduced by the statute, is that usually resorted to; although undoubtedly the prosecutor may at this day avail himself of his common law proceeding of an action on the case, or information for a false return,(r) as circumstances may require.

—.] *What a False Return.*—If a return be true in words, yet false as to the substance of the facts, an action for a false return will lie against the defendant,(s) so, a return to a traversable allegation, if untrue in fact, will support such an action.(t) So, such an action will lie as well for a “*suppressio veri*,” as for an “*allegatio falsi*.” Thus, if there be two charters, the one giving a power of amotion to select part of a corporation, and the other of a later date, confirming the former as to every thing, but restoring the right of amotion to the body at large, and the writ of mandamus state a removal by the select part, but the return in answer set forth the old charter only, notwithstanding all the facts in that return would be true, yet certainly an action on the case might be maintained for the deceit. So, that wherever in a return there is a [*429] *suppression of a truth, or the expression of an untruth, and the prosecutor is injured thereby, he may maintain such action.(u) Also if a return be improperly made by one defendant in the name of others, such is a false return in law.(v)

As a return must have been adjudged to be sufficient in law before an action on the case, or information for a false return can be successfully

(p) See stat. App. As to Ireland, see stat. 9 & 10 Vict. c. 113, s. 2, App.

(q) See App. As to Ireland, see stat.

(r) *R. v. Williams*, 8 B. & C. 683.† *S. C.* 3 M. & R. 405. *R. v. London (Mayor)*, 3 B. & Ad. 276.† *R. v. Durham (Mayor)*, Barr. 129. *R. v. Kelk*, 12 A. & E. 559.† *R. v. Brancaster (Churchwardens)*, 7 A. & E. 459.† *S. C.* 2 N. & P. 580. *R. v. Payn*, 6 A. & E. 404.† *S. C.* 1 N. & P. 524.† *S. C.* 1 W. W. & D. 99, 142. *S. C.* 2 Jur. 47.

(s) *R. v. Lyme Regis*, 1 Doug. 159, per Buller, J. *Braithwaite's case*, 1 Doug. 182, n.; 1 Vent. 19; 6 Rep. 186, n. (G.); *Carth.* 171.

(t) *R. v. Round*, 4 A. & E. 142.† *S. C.* 5 N. & M. 427.† *S. C.* 1 H. & W. 546.

(u) 1 Doug. 156, 157, *supra*, n. (s); *Bac. Abr.* tit. “*Man.*” (L.), n.

(v) See *ante*, p. 344, n. (b). See *ante*, 341, 342, 343, 344.

brought, (w) so, if the return be either frivolous or immaterial, no action will lie upon it, but a peremptory mandamus should be moved for. (x)

—.] *In what Court.*—An action on the case for a false return may be brought in any Court, but in order to obtain a peremptory mandamus, such action must be brought in the Court of B. R., because as every peremptory mandamus should recite the fact of prout constat nobis per recordum, how can that be done if the proceedings are, for instance, in the Court of C. B.? as one Court cannot judicially take notice of the proceedings of another. (y) Yet, in an action for a false return, judgment in which was given for the defendant, which upon a writ of error in the Exchequer Chamber affirmed in the House of Lords was reversed, the Court of B. R. granted a peremptory mandamus before judgment entered saying it was a mandatory writ, and not a judicial one founded upon the record. (z)

—.] *Plaintiffs.*—Where two or more persons receive a joint damage or expense they may join in an action for a false return. Thus, where two churchwardens had obtained a mandamus to the official to be sworn, who refused and made a false return, it was held they might join in a suit against him for such return. (a) So, where the mandamus, and the whole prosecution and charge thereof is joint, a joint action for a false return will lie, for such action is not brought for the office, &c., but for the unjust return. (b) So, where sixteen people joined in an application for a mandamus to register the certificate of a place of *meeting for the religious worship of dissenters, and they all joined in an action for [*430] a false return, it was held, that they might, for they had all jointly sued and prosecuted the mandamus as their joint charge, which were the damages the plaintiffs sued to recover. (c)

If, however, the interest be separate, or the damages be several in such cases, two or more cannot join in such an action, and the objection is one in arrest of judgment. (d)

—.] *Defendants.*—If a false return be made by several, the action against them may be either joint or several, it being founded on a tort

(w) See ante, p. 383, n. (d).

(x) See ante, p. 352, 373. *Crawford v. Powell*, 1 W. Blac. 229. S. C. Burr. 1013.

(y) See ante, p. 407. *Anon.*, 2 Salk. 428. S. C. Ld. Raym. 125. S. C. 5 Mod. 316. *R. v. Green, Skin.* 670. S. C. Holt, 183. Bac. Abr. tit. "Man." (M.)

(z) See ante, p. 407; Bull. N. P. 198, 202. *Philips v. Bury*, 2 Salk. 413. *Faldowe v. Ridge, Cro. Jac.* 206. S. C. Yelv. 74; 2 Vent. 295. *Hicks v. Sherburn*, Bac. Abr. tit. "Man." 287, (M.)

(a) 3 Salk. 302, 1. *Weller v. Baker*, 2 Wils. 414. *Ward v. Brampton*, 3 Lev. 362. S. C. 1 Danvers, 6, pl. 10. S. C. 2 Wms. Saund. 116, a, b, n. 3. *Anon.*, 2 Salk. 428. S. C. Raym. 125. S. C. 5 Mod. 316. Vide 12 Mod. 349, 371. Bac. Abr. tit. "Man." B.

(b) 3 Lev. 362, supra, n. (a). *Linley Chapel (Inhabs.) v. Chester (Ep.)*, cited in 3 Lev. 363.

(c) *Green v. Pope*, 1 Ld. Raym. 125. *Ward v. Brampton*, 3 Lev. 362. See Fall v. Reg. 1 Q. B. 657, 658.† S. C. 2 G. & D. 808. S. C. 13 L. J., N. S. 187, Q. B. Bac. Abr. tit. "Man." (L.), n.

(d) See supra, n. (c). *Butler v. Rews*, 12 Mod. 349. *R. v. Andover (Town)*, 12 Mod. 332. S. C. 2 Salk. 433. S. C. Holt, 441. *Butler v. —*, 12 Mod. 371.

and a species of the action on the case.(c) Thus, if a return be made by a mayor and aldermen, the action may be brought either against all or against the mayor only, but if in the latter case it appear upon the evidence that he voted against the return, but was overruled by the majority, the plaintiff will be nonsuited.(f)

An action on the case for a false return to a writ of mandamus lies against a corporation, whether or not the return be made by such corporation under its corporate seal,(g) or although it be neither signed nor sealed.(h) It may also be brought against the whole corporation by the name of the writ,(i) or against any particular member of it(j) in his personal name.(k)

The action on the case for a false return to the mandamus, is as to its pleadings, &c., essentially a civil action, and is therefore governed by all the rules of pleading and practice applicable to such actions.

—.] *Declaration.*—In a declaration for a false return to a mandamus, it need not be alleged that the defendants ought to have obeyed it, for by making a return and alleging a reason why they could not obey the writ, that is admitted.(l) It should however, be positively shewn upon [*431] the face of the declaration, that the return has been adjudged to be and is sufficient in law.(m)

An action for a false return to a writ of mandamus is local, and must be laid at the election of the plaintiff, in the county where the return was made, or in the county where the Court sits, in which it is recorded for such a return consists of two falsities, viz., that of the fact falsely returned, and the falsity of returning it on record.(n) The Court will not change the venue on the application of the defendant without the plaintiff's consent.(o)

(c) See Chit. on Pl., "Parties to Actions." Rich v. Pilkington, Carth. 171.

(f) Bac. Abr. tit. "Man." (L.). R. v. Chapman, 6 Mod. 152.

(g) Argent v. St. Paul's (Dean), 3 Doug. 238.

(h) Mayor of Thetford's case, 1 Salk. 191, 4. Bac. Abr. tit. "Man." (L.)

(i) See ante, p. 342, 344. R. v. Halse, 1 Keb. 20; Ld. Raym. 564, per Holt, C. J.

(j) R. v. Chapman, 6 Mod. 152, and cases there cited. S. C. Holt, 443.

(k) R. v. Rippon (Corp.), 1 Com. 86, c. 55. S. C. Ld. Raym. 564. S. C. 2 Salk. 433. Vaughan v. Lewis, Carth. 227, (where see form of declaration). Rich v. Pilkington, Carth. 171. Argent v. St. Paul's (Dean), 3 Doug. 238. Enfield v. Hills, Sir T. Jones, 116. S. C. 2 Lev. 236. S. C. 3 Keb. 859.

(l) Mayor of Norwich's case, 12 Mod. 322. The following cases contain forms of declaration in an action for a false return. To admit a sexton, 2 B. & C. 313.† S. C. 3 D. & R. 549.† For not accepting a surrender, 4 M. & S. 486. For not appointing a sexton, 10 East, 259. For not calling a parish meeting to license a curate, 6 D. & R. 517.† To admit an alderman, 3 P. & D. 505. So swear in churchwardens, 2 Lut. 1012, which declaration was drawn by Pollexfen and Holt, ore C. J. Com. Dig. tit. "Return." (f.)

(m) See ante, p. 429. R. v. London (Mayor), 3 B. & Ad. 276, 279.† R. v. London (Mayor), 5 B. & Ad. 233.† Enfield v. Hills, 2 Lev. 236, 238. S. C. Sir T. Jones, 116. Com. Dig. tit. "Man." D. 6.

(n) See ante, p. 388, n. (k). Anon., 12 Mod. 515. S. C. 2 Salk. 669. Lord v. Francis, 12 Mod. 408. S. C. Holt, 170. Russell v. Succlin, 1 Sid. 218. R. v. Newcastle-upon-Tyne (Mayor), 1 East, 115.

(o) See 12 Mod. 515, supra, n. (n).

—.] *Evidence, &c.*—In an action for a false return, the defendant may have inspection, &c., and copy of charters, &c. (*p*)

The evidence in each case must necessarily vary with the facts of each return. The following decisions on the sufficiency of evidence in certain cases appear in the books. In an action for a false return of “non fuit electus,” the plaintiff need not prove having taken the Sacrament within the year before election, if the trial be above six months after the election, and there have not been any prosecution, (*q*) and upon such an issue as to a corporate officer, Lord Holt has said, if one be irregularly chosen at first, and afterwards his title be recognised and his name entered in the corporation books, or regularly chosen into a superior dignity, such should be taken to be such evidence of a good election as ought not to be controverted. (*r*)

That which is only a circumstance and not the point of truth, or falsity of the return need not be proved, as that the plaintiff after he was elected, presented himself to be sworn. (*s*)

It should be proved that the return was made by the defendant. (*t*) *The delivery of the writ need not however be proved. (*u*) [*432] But as in the case of a corporation, the return need neither be signed nor sealed, so, it will be sufficient evidence against the mayor in an action for a false return, that the mandamus was delivered to him, and such a return has been made, unless he prove it is not his return. (*v*) The Court allows the propriety of issuing the writ of mandamus to be questioned, (*w*) but it seems the validity of the writ may be impugned, if the action be brought in B. R. (*x*)

—.] *Verdict.*—If the action be brought in the Court of B. R., and a verdict be found for the plaintiff in such action, the return thereby proved to be false is no return in contemplation of law, (*y*) and a peremptory mandamus will be awarded, (*z*) upon motion on reading an office copy of the record in the action or information. (*a*)

(*p*) Anon., 2 Salk. 430. Com. Dig. tit. “Man.” D. 2. But see ante, p. 378, 379, n. (*m*).

(*q*) Crawford v. Powell, Burr. 1013. Com. Dig. tit. “Man.” D. 6. As to evidence on non fuit electus, see Ld. Raym. 1354; Stra. 1145. S. C. 7 Mod. 365; Bull. N. P. 205, 206.

(*r*) Lord v. Francis, 12 Mod. 408. S. C. Holt, 170. Piper v. Dennis, 12 Mod. 253. R. v. Monmouth (Mayor), 4 B. & A. 496.†

(*s*) Batson v. Sayer, Stra. 728. Com. Dig. tit. “Man.” D. 6.

(*t*) Vaughan v. Lewis, Carth. 229. R. v. Chalice, Ld. Raym. 848; Bull. N. P. 205. See ante, p. 341, 342, 343, 344, 430, n. (*f*), and post, p. 434, n. (*r*).

(*u*) See post, p. 434. R. v. Chapman, 6 Mod. 152. S. C. Holt, 443.

(*v*) See ante, p. 363. R. v. Exeter (Mayor), Ld. Ray. 223. Bull. N. P. 209. Bac. Abr. tit. “Man.” (L.)

(*w*) R. v. Clarke, 2 East, 82. Green v. Pope, Ld. Ray. 126. Bac. Abr. tit. “Man.” (L.)

(*x*) See ante, p. 374, n. (*o*). Green v. Pope, Ld. Ray. 125, 126. Clarke v. Leicestershire Canal, 6 Q. B. 600.†

(*y*) R. v. Heathcote, 10 Mod. 57. R. v. Ely (Ep.), 2 T. R. 319. Bowles v. Neale, 7 C. & P. 262.†

(*z*) See ante, p. 402, n. (*f*). R. v. Green, Skin. 670. S. C. 2 Salk. 428. S. C. Ld. Raym. 125. S. C. 5 Mod. 316; 11 Co. 99 b; Com. Dig. tit. “Man.” D. 6.

(*a*) Gude's Cr. Pr. 188.

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The Court, if necessary, will refer certain points to arbitration.(b)

——.] *Error*.—A writ of error lies in an action for a false return to a mandamus, and operates as a supersedeas to a peremptory mandamus.(c) It is the same as in a personal action.

[COSTS.] The rules as to costs are the same as in personal actions.(d)

INFORMATION FOR A FALSE RETURN.] *When it lies*.—If the writ of mandamus have not been brought in respect of a private right, but public government is concerned, so that an action for a false return cannot be maintained, and the case be not within the stat. 9 Ann. c. 20, so that the return may be traversed, and if proper, a peremptory mandamus awarded, and the matter be one in which no one is particularly interested, the Court will, on application, grant a criminal information against all the parties who made such false return, in order that the disputed facts may be tried.(e) Thus, such an information will be *granted against a [*433] mayor, for making a return against the votes of the majority;(f) and notwithstanding the return may be under the common seal, yet such an information may be moved against the particular persons who procured it.(g)

A criminal information will not, however, lie against justices, for having made a false return to a mandamus, unless such return be corruptly and wilfully false;(h) nor where the return depends upon a matter of doubtful law.(i) But where justices had made a false return to a mandamus, to appoint overseers for a township, and the Court had thereupon granted a rule nisi for a criminal information, and on shewing cause against that rule, contradictory facts were disclosed which were directed to be tried by an issue, and after an issue had been prepared and delivered, the justices abandoned the issue, and obtained a Judge's order for staying proceedings, without prejudice to the question of costs, the Court ordered the justices to pay the prosecutor the costs of preparing and delivering the issue.(j) So such an information will be granted against justices of

(b) See ante, p. 412. Dr. Widdrington's case, Raym. 68. S. C. 1 Sid. 71.

(c) Ruding v. Newel, Stra. 983. See ante, p. 406, and tit. "Error," 397.

(d) See Chit. Prac. tit. "Costs."

(e) R. v. Spotland (Overseers), Cas. t. Hard. 184. Bac. Abr. tit. "Man." (L.) Surgeons' Company's (Case), 1 Salk. 371; Id. Raym. 584. R. v. Petteward, Burr. 2452, 3. R. v. Lancashire (J.), 1 D. & R. 485.† R. v. Nottingham (Mayor), Bull. N. P. 199, 203. Anon., Loft. 185. R. v. Chapman, 6 Mod. 152. S. C. Holt, 442. Fall v. R. 1 Q. B. 644, 645.† S. C. 2 G. & D. 808. Com. Dig. tit. "Man." D. 6.

(f) See ante, p. 341, 342, 343. The case of Abingdon Town, Carth. 500. S. C. 12 Mod. 303. S. C. 1 Salk. 431. S. C. 2 Salk. 699. S. C. Holt, 440. S. C. Id. Raym. 559.

(g) See ante, p. 430. The case of the Surgeons' Company, Com. Dig. tit. "Man." (D. 6).

(h) R. v. Lancash. (J.), 1 D. & R. 485.† and n. (a). R. v. Spotland, Cas. t. Hard. 184. S. C. 1 Barn. 137. See R. v. Petteward, Burr. 2452.

(i) R. v. Petteward, Burr. 2452.

(j) See 1 D. & R. 485,† supra, n. (h).

the peace for disobedience to a peremptory mandamus ;(*k*) or for making a shuffling and evasive return.(*l*)

—.] *Motion*.—The rule for a criminal information is obtained by application to the Court, on motion, supported by affidavits of the facts ;(*m*) the Court will easily grant it, but the rule is, in the first instance, a rule to shew cause only ;(*n*) it cannot, however, be moved for, until the return shall have been filed and allowed.(*o*)

—.] *Venue*.—The Court will not change the venue in an information for a false return to a mandamus, (*p*) and has distinguished the case of an action for a false return, from an information in this respect.(*q*)

*—.] *Evidence*.—A copy from the Crown Office of the writ [*434] and return thereto is sufficient evidence against the defendant on the trial of the information ;(*r*) the delivery of the writ need not be proved ;(*r*) nor will the Court suffer the propriety of issuing the writ of mandamus to be questioned.(*s*)

—.] *Verdict*.—After the return has been falsified by a verdict for the prosecutor, a peremptory mandamus will lie as of right.(*t*) But the motion for such writ cannot be made till four days after the return of the postea, because the defendant has so long to move in arrest of judgment.(*u*) As no damages are recoverable by the prosecutor, so the Court imposes a fine(*v*) upon the defendants, if unsuccessful.

(*k*) *R. v. Corbett*, Sayer, 267, where see the special terms upon which the rule was discharged.

(*l*) See ante, p. 352, n. (*u*).

(*m*) See ante, p. 295, 296. *Anon.*, Lofft. 185. The case of the Surgeons' Company, 1 Salk. 373, 16. *R. v. Petteward*, Barr. 2454. For the full practice of a criminal information, see *Corn. Cr. Pr.* p. 168.

(*n*) *Anon.*, 1 Barn. 327. Surgeons' Company's (Case), 1 Salk. 374. *R. v. Corbett*, Sayer, 267.

(*o*) See ante, p. 383. Bull. N. P. 199. Bac. Abr. tit. "Man." (L.), n. *R. v. Lancaster*, 1 D. & R. 485. Supra, n. (*k*).

(*p*) *R. v. Barton*, Say. 146.

(*q*) *R. v. Oxford* (Mayor), Say. 146.

(*r*) See ante, p. 432. *R. v. Chapman*, 6 Mod. 152. S. C. Holt, 442, 443. See tit. "False Return" (Evidence).

(*s*) *R. v. Clarke*, 2 East, 82. *Green v. Pope*, Ld. Ray. 126.

(*t*) See ante, p. 402, n. (*f*). *Buckley v. Palmer*, 2 Salk. 430, 431.

(*u*) See ante, p. 406, n. (*d*). Case of the City of Exeter, P. 12 Wm. 3, B. R., and see 1 Salk. 374. Supra, n. (*n*).

(*v*) 1 Salk. 374, cited in 5 Bac. Abr. 286, tit. "Man." (L.), 7th edit. Ca. temp. Hard. 184. Bull. N. P. 203 ; 1 G. & D. 121, 123. S. C. 1 Q. B. 644 ;† Barr. 2452 ; 1 D. & R. 485,† supra. *Buckley v. Palmer*, 2 Salk. 431. *R. v. Abingdon* (Mayor), 2 Salk. 431, 432. S. C. Carth. 500. S. C. Ld. Raym. 559.

APPENDIX

TO

THE LAW AND PRACTICE

OF THE

High Prerogative

WRIT OF MANDAMUS.

FORM A.

*A Letter from King Hen. IV. to the certain Sheriffs to raise men for the
defence of the kingdom against the invasion of Oweyn Glendourdy.
Dated Thursday, 26th May, 2 Hen. IV. 1401.*

Treschier t foial, Nous vous salvons en vous signifiaint que yee Jeudy le xxvj. jour de May a nous estoit apportee certaine nouvelle a nre chastel de Walyngford que Oweyn Glendourdy t autres noz rebelx de nre pays de Gales se sont levez t de nouvelle assemblez en les marches de Kermerdyn aiant en purpos dentrer en nre roiaume ove fort main pour destruire nre lange Angloys t tous noz foialx lieges t soubgiez qui Dieux defende et pour resister a la malice de noz ditz rebelx nous suyves ordonnez a departir demain de nre dit chastel et de tener nre chemyn vers les parties de Wirecestre. Par quoi *nous mandons* que ovee les chivalers escuiers gentz darmes t le plus suffisantz archers de nre countee dont vous estes nre viscounte vous soiez devers nous [par la ou nous soions] en tout hast possible sauns defaute sur la foye t ligeance que vous nous devez t come vous desirez la salvacioun de nous t de nre roialme. Donne soubz nre signet a lavandit nre chastel le Jeudy suisdit.(a)

(a) Bibl. Cotton. Cleopatra, f. 111, f. 115: 2 Nicolas Proc. Priv. Coun. 54.

The above is a specimen of a "Letter Missive," which shews the condition of the writ of mandamus some centuries before it became a judicial writ. See ante, p. 3, n. (h).

*FORM B.

[*436]

Privy Seal commanding the Treasurer and Chamberlains of the Exchequer to deliver to the Bishop of Lincoln certain articles of plate, &c. (L: 3; 18, 1. No. 2.) (a)

Edward p la g^{ra}ce de Dieu Roi d Engleterre Seign^r d Irlaunde t Dues d Aquitaine as Tresorier t Chambrelains de nre Eschequier saluz. Nous vous mandoms q la vessele d argent t les jeux l on^rable Piere en Dieu l Evesq, de Nicole q feurent p^{is} de lui, en temps nre ts ch Seign^r t Piere t livez a nre ch clerc Thomas de Usflete p les meins Nichol de Falle t puis sont devenuz en vre garde, et auxint les tentes t pavillons le dit Evesq, q vo' avez en garde facez liver a mesme l Evesq, ou a son attournez p endenture. Don souz nre p^{ri}ve seal a Estaunford le xxvi. jour d Averil l an de nre regne pimer.

FORM C.

6 Hen. VIII.—*Privy Seal directing the delivery to the Ambassadors (about to repair to France) of the treaty of Amboise, 1492. (Memoranda, p. 149. (b))*

Henry by the grace of God King of England and of Fraunce and Lorde of Ireland. To the Tresourer and Chamberlains of our Eschequier greeting, Where as a certain bonde and writing obligatory heretofore made by King Charles of Fraunce undre his grete seal and signe manuell unto the late King our Fader whome God pdone bering date at Ambasie the xiiith day of Decembr the yere of our Lorde God M^l.ccccLXXXII remaigneth in the Tresourye of our said Eschequier. We for divse consideracons us and or Counsaill moeving woll and *camōunde* you to deliv the said bond and writing unto or ryght trusty cousyn th Erle of Worcestre or Chamblain the Prior of Seint Johns Jertm wthin this or reame and Doctor West or Counsaillors which we nowe sende in or ambassade unto or derest brother and cousyn Kyng Loys of Fraunce, And these o^r lres shal be yo^r sufficient warrant and discharge in that behalf. Yeven undre or prive scale at or man^r of Gylforth the xxixth day of August the vith yere of our reigne.

PURDE.

(a) See Palgrave's Anc. Exr., Kal. & Inv., vol. 2, p. 143. The above "Privy Seal" shews an ancient condition of the writ of mandamus.

(b) See Palgrave's Anc. Exr., Kal. &c., vol. 2, p. 402. See preceding form of "Privy Seal," n. (a).

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*FORM D.

3 *Ed. III.*—*A writ commanding the Treasurer and Chamberlains of the Exchequer to deliver to John de Stonore, Chief Justice of the Bench, and successor of Willicmus de Herle, late Chief Justice thereof, the Rolls which had been brought in by the latter.* (L: 3; 18, 2. No. 1). (a)

Edwardus Dei gra Rex Angl Ds Hibnn t Dux Aquit Thes t Camar suis: saltm. Cum constituim' dilem t fidelem nrm Johem de Stonore Capitalem Justie nrm de Banco ad plita in eodem Banco una cum aliis fidelibz nris sedm legem t consuetudinē regni nri tenend qamdiu nob placuit t mandavim' dileo t fideli nro Willo de Herle qd rotulos t omia alia officii illud tangencia que in custodia sua existunt, ad Scaem nrm sine dilone venire fac vob p indenturam inde conficiend, liband. *Vob mandam'* qd rotulos t omia alia dem officii tangencia que pfatus Wills vob ut pmittitr libabit, pfato Johi p indenturam modo debito inde conficiend, libetis ad faciend ea que ad officii suū ptinēt in hac parte. T. me ipo apud Glouc teio die Septembr anno r. n. teio.

p. ipm Regem t cons.

A precedent of a writ of restitution [ante, p. 3, n. (m)] before Fortescue, Chief Justice of the Queen's Bench in the time of Hen. VI., cited in Middleton's Case, E. T., 16 Eliz., 2 Dyer, 332 b. See Officina Brevium, p. 189.(b)

Rex maiori(b) ciuitatis London salutem. Cum Richardus Anable de London pewterer iuxta legem et cons regni nostri Angliæ, temporibus nostris et progenitorum nostrorum Regum Angliæ haecenus pro quibuscunque ligeis nostris et progenitorum nostrorum prædictorum visitat et approbat in curia nostra coram nobis per breue implacitaverit Thom Fawconer de London mercer, nuper Eschaectorem ciuitatis nostræ prædictæ, de [*438] quibusdam transg in *breui illo specificat eidem Rich. (vt. dicitur) illatis, tamen ex parte prædicti Richardi in curia nostra prædicta coram nobis grauem querelam recepimus, continent quod licet idem Richardus a diu in libertatem et franchises infra eandem ciuitatem habere et gaudere, sicut cæteri conceines, status et cōdicionis suæ eiusdem ciuitatis, habere et gaudere consueuerunt, vt unus de conceinibus eiusdem ciuitatis,

(a) See Palgrave's *Anc. Extr.*, Kal. &c., vol. 2, p. 148. This form exhibits the present writ of mandamus in its condition of "Parliamentary Writ." See ante, p. 3, n. (l) 251, n. (z), 269, n. (w).

(b) In the report of Middleton's case, 2 Dyer, 332 b, it is stated that a similar writ to the one in Anable's case was made in the same Term, but that it was in a better form, inas-much as it was directed to the mayor, alderman, and sheriffs of London, with words to restore the prosecutor to his former liberties, &c.

a tempore quo admissus fuit quousque ipse querelam suam prædictam de transgres prædict versus præf Thomam in curia nostra coram nobis mouisset, et prof fuiset pacifice et quiete gaudebat et habere solebat. Vos occasione motionis querelæ prædictæ, versus prædictum Thomam, et prosecutionem eiusdem alibi quam coram vobis infra ciuitatem nostram prædictam ipsum Richardum libertates suas infra ciuitatem nostram prædictam amittere causare intenditis, et ostia et fenestras ipsius Richardi mansionis suæ infra eandem ciuitatem claudi et serari fecistis, et plura alia grauamina sibi intollerabilia, imposuistis et imponi fecist, quo minus idem Richardus iusticiam suam dictæ querelæ trasgressionis prædictæ, in dicta curia nostra coram nobis libere, sicut ligeus noster consequi possit, in nostri contemptu et ipsius Richardi dapnum grauissimum, et in hac parte perniciosum exemplum ac regalie coronæ nostræ et dignitatis maximam derogationem: precipue cum prærogatiua regalie nostræ, qua nos et progenitores nostri supradicti de iure vsi fuerimus sicuti dignitati nostræ regie cōpetet vt ius coronæ nostræ personæ nostræ annexum, quod quilibet ligeus noster qui huiusmodi ius suum coram nobis prosequi voluerit, et illud ibid liber cōsequi possit, absque aliqua indignae, vexatione, grauamine, seu impedimento ea occasione sibi alibi per aliquem imponend. VOBIS igitur MANDAMUS firmiter iniungen, quod si ostia aliqua, aut fenestras mansionis ipsius Richardi ea occasione claudi feceritis, ea sine dilatione aperiri faciatis, ipsumque Richardum seu conquerent prædictos, ac eorum aliquem occasionibus prædictis non molestantes in aliquo seu grauantes, ET si quid in contrarium feceritis, id sine dilatione eidem Richardo relaxetis et emendari faciatis. Teste J. Fortescue.(a)

(a) Many Judges have, when speaking of the antiquity of the writ of mandamus, erroneously referred to Bagg's case, 11 Rep. 93 b, temp. 13 Jac. 1, as being the first writ that was granted for a municipal office. The above case, temp. Hen. 6, and also Middleton's case, prove the falsity of the assertion. See ante, p. 2, n. (f).

APPENDIX

OF THE

ENGLISH STATUTES

RELATING TO THE

HIGH PREROGATIVE WRIT OF MANDAMUS.

[*439]

*9 ANNE, c. 20.

An Act for rendering the Proceedings upon Writs of Mandamus, and Informations in the nature of a Quo Warranto, more speedy and effectual; and for the more easy trying and determining the Rights of Offices and Franchises in Corporations and Boroughs.(a)

WHEREAS divers persons have of late illegally intruded themselves into, and have taken upon themselves to execute the offices of mayors, bailiffs, portreeves and other offices within cities, towns corporate, boroughs and places, within that part of Great Britain called England and Wales; and where such offices were annual offices, it hath been found very difficult, if not impracticable, by the laws now in being, to bring to a trial and determination the right of such persons to the said offices within the compass of the year; and where such offices were not annual offices, it hath been found difficult to try and determine the right of such persons to such offices, before they have done divers acts in their said offices prejudicial to the peace, order, and good government within such cities, towns corporate, boroughs and places, wherein they have respectively acted.

AND whereas divers persons who had a right to such offices, or to be burgesses or freemen of such cities, towns corporate, boroughs or places, have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted or restored to their said offices or franchises of being burgesses or freemen, than by writs of *man-*

(a) Only so much of this statute is given as appertains to the subject "mandamus." This statute is stated by Foster, J., in *R. v. Williams*, Burr. 402, 408, to have been drawn by Powell, J., with great care and attention, its object being to provide for speeding prosecutions, and to quicken the removal of the usurpers of municipal offices. *R. v. Heathcote*, 10 Mod. 54, per Eyre, J. S. C. Fort. 290.

damus, the proceedings on which are very dilatory and expensive, whereby great mischiefs have already ensued, and more are likely to ensue, if not timely prevented : for remedy whereof,

IT IS ENACTED, That from and after the first day of Trinity Term, in the year of our Lord one thousand seven hundred and eleven, where any writ of *mandamus* shall issue out of the Court of Queen's Bench, the Courts of Sessions of Counties Palatine, or out of any the Courts of Grand Sessions in Wales, in any of the cases aforesaid, such person or persons who by the laws of this realm are required to make a return to such writ of *mandamus*, shall make his or their return to the first writ of *mandamus*.(b)

2. THAT from and after the said first day of Trinity Term, as often as in any of the cases aforesaid any writ of *mandamus* shall issue out of any of the said Courts, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of *mandamus*, to plead to, or traverse all or any the material facts contained within the said return : to which the *person or persons [*440] making such return shall reply, take issue, or demur ; and such further proceedings, and in such manner shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return ; and if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same in such place as an issue joined in such action on the case should or might have been tried ; and in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by nil dicit, or for want of a replication or other pleading, he or they shall recover his and their damages and costs in such manner as he or they might have done in such action on the case as aforesaid ; such costs and damages to be levied by *capias ad satisfaciendum*, *fieri facias*, or *elegit* ; and a PEREMPTORY writ of *mandamus* shall be granted without delay, for him or them for whom judgment shall be given, as might have been, if such return had been adjudged insufficient ; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid.

3. *Provided always*, That if any damages shall be recovered by virtue of this act against any such person or persons making such return to such writ as aforesaid, he or they shall not be liable to be sued in any other action or suit, for the making such return ; any law, usage, or custom to the contrary thereof in anywise notwithstanding.

6. THAT it shall and may be lawful to and for the said Courts respectively, to allow to such person or persons respectively, to whom any writ of *mandamus* shall be directed, in any of the cases aforesaid, or to the

(b) See stat. 11 Geo. 1, c. 4, s. 6, post, p. 444.

person or persons who shall sue or prosecute the same, such convenient time respectively, to make a return, plead, reply, rejoin or demur, *as to the said Courts respectively shall seem just and reasonable*; anything herein contained to the contrary thereof in anywise notwithstanding.

7. THAT after the said first day of Trinity Term, an act made in the fourth year of her Majesty's reign, intituled, "An Act for the Amendment of the Law, and the better Advancement of Justice," and all the statutes of jeofayles, shall be extended to all writs of *mandamus* and proceedings thereon, for any the matters in this act mentioned.

1 GEO. 1, ST. 2, c. 13.

An Act for the further Security of His Majesties Person and Government, and the Succession of the Crown in the Heirs of the late Princess Sophia, being Protestants; and for Extinguishing the Hopes of the Pretended Prince of Wales, and his Open and Secret Abettors.(a)

By sect. 11, it is enacted, THAT if any head or member of any college or hall within either of the Universities of Oxford or Cambridge, that are or shall be of the foundation, or that do or shall enjoy any exhibition, being of (or as soon as he shall attain) the age of eighteen years, shall neglect or refuse to take and subscribe the several oaths in this act mentioned, according to the true intent and meaning of this act, or to produce a certificate thereof, under the hand of some proper officer of the respective Court, and cause the same to be entered in the register of such college or hall within *one month* after his having taken and subscribed [*441] the said oaths; and if the *persons in whom the right of election of such head or member shall be, do neglect or refuse to elect some other fitting or proper person, in the place or stead of such head or member so neglecting and refusing to take and subscribe the said oaths as aforesaid, by the space of twelve months after such neglect or refusal, that then, and from thenceforth, it shall and may be lawful unto and for the king's most excellent majesty, his heirs and successors, under the great seal or sign manual, to nominate and appoint some fitting person, qualified according to the local statutes of such college or hall, to succeed to the place of such person who shall neglect or refuse to take and subscribe the said oaths; and that every person so to be nominated and appointed, shall have and enjoy such place to which he shall be nominated and appointed as aforesaid, to all intents and purposes whatsoever, and all benefits, privileges, and advantages to the same belonging and appertaining, as if such person had been elected and chosen by the proper electors of such college or hall.

(a) Only so much of this statute is given as has relation to the subject "mandamus." See ante, tits. "College," p. 76, and "University," p. 267.

12. THAT if the head of any college or hall in either of the universities, or other person or persons lawfully authorized to admit, shall refuse or neglect to admit such persons so nominated and appointed under the great seal or sign manual as aforesaid, by the space of ten days after such admission shall be demanded of him or them, who ought to make such admission to such place as he shall be nominated to as aforesaid, that then and in such case the local visitor or visitors of such college or hall is hereby authorized and required to admit and place such person so nominated and appointed to such place as he shall be nominated to as aforesaid, within the space of one month after the same shall be demanded of such visitor; and in case such visitor shall neglect or refuse to admit as aforesaid, during the space of one month after the same is lawfully demanded of such visitor, that then it shall and may be lawful to and for the Court of King's Bench at Westminster, to issue out a writ of mandamus to be directed to such visitor or visitors, to admit such person to such place, and to proceed upon the said writ, according to the course of the said Court in such cases.

13. *Provided always*, That any person who by any neglect or refusal according to this act, shall lose or forfeit any office, may be capable of a new grant of the said office, or of any other, and have and hold the same again, such person taking the said oaths in such manner as aforesaid, so as such office be not granted to, or actually enjoyed by some person at the time of regrantee thereof.

14. *Provided also*, THAT nothing herein contained shall be construed to extend to any person in his majesties service on board the fleet, or to any person whatsoever who shall go beyond the seas before the first day of November next, so as such person take the said oaths, and subscribe thereunto as aforesaid, according to the appointment of this act, within three months after his return.

*11 GEO. 1, c. 4.(a)

[*442]

An Act for Preventing the Inconveniencies arising for want of Elections of Mayors, or other Chief Magistrates of Boroughs or Corporations being made upon the Days appointed by Charter or Usage for that Purpose, and directing in what Manner such Elections shall be afterwards made.(b)

WHEREAS in many cities, boroughs, and towns corporate within that

(a) Only so much of this act is given as appertains to the subject "mandamus." This act is continued by the 7 Wm. 4, and 1 Vict. c. 78, s. 26, which see post, 450, and being a remedial one, receives a liberal construction. R. v. Pole, B. R. T. 7 & 8 Geo. 2.

(b) The contests in the City of London, as to the election of municipal officers, induced the passing of this act. R. v. Heathcote, 10 Mod. 63.

part of Great Britain called England, Wales, and Berwick-upon-Tweed, the election of the mayor, bailiff, or bailiffs, or other chief officer or officers is by charter or ancient usage confined to a particular day or time, without any provision how to act or proceed, in case no election be then made; and it frequently happens that by such charter or usage particular acts are required to be done at certain times, in order to and for the completing of such elections, and by the contrivance or default of the person or persons who ought to hold the Court, or preside in the assembly where such elections are to be made, or such acts to be done, or by accident it hath sometimes happened, and may frequently do so, if not timely prevented, that no Courts or assemblies have been held, or elections made, or such acts done within the time fixed for that purpose; in which cases, if elections of such officers could not afterwards be made or completed, or, in consequence of such omission, the corporation should be dissolved, great mischiefs might ensue: for remedy and prevention whereof it is enacted, That if in any city, borough, or town corporate, within that part of Great Britain called England, Wales, and Berwick-upon-Tweed, no election(c) shall be made of the mayor, bailiff or bailiffs, or other chief officer or officers of such city, borough, or town corporate, upon the day, or within the time appointed by charter or usage for such election, or such election being made, shall afterwards become void, whether such omission or avoidance shall happen through the default of the officer or officers who ought to hold the Court, or preside where such election is to be made, or by any accident or other means whatsoever, the corporation shall not thereby be deemed or taken to be dissolved or disabled from electing such officer or officers for the future: but in any case where no election shall be made, as aforesaid, it shall and may be lawful for the members or persons of such city, borough, or corporation, who have right to vote, or be present at, or to do any other act necessary to be done, in order to or for the completing of such election; and they, or such of them as shall not be hindered by any reasonable impediment or excuse, are hereby required respectively to meet or assemble together in the town-hall, or other usual place of meeting for making such election, within such city, borough, or town corporate, upon the day next after the expiration of the time within which such election ought to have been made, unless such day shall happen to be Sunday, and then upon the Monday following, between the hours of ten in the morning and two in the afternoon of the same day; and that the members or persons having right to vote at, or to do any other act necessary to be done in order to such election, or such of them as shall be so assembled or met together, shall forthwith proceed to the election of a mayor, bailiff or [*443] *bailiffs, or other chief officer or officers for such city, borough, or corporation, and to do every act necessary to be done in order to

(c) The words "no election," mean no legal election; therefore, although there may have been an election de facto, the Court will, in some cases, award a mandamus according to the provisions of the act. *R. v. Newsham*, Sayer, 211. *R. v. Bankes*, Burr. 1454. *R. v. Colchester (Mayor)*, 2 T. R. 259.

or for the completing of such election, in such manner as was usual in, or in order to the election of such officer or officers, upon the day, or within the time appointed by charter or usage for such election; and in case, upon such day of meeting hereby appointed for such election, the mayor, bailiff or bailiffs, or other proper officer or officers, who ought to have held the Court, or presided at the assembly for such election, or doing any other act necessary to be done in order to such election, if the same had been made or done on the day fixed, or within the time limited by charter or usage for that purpose, shall be absent, then such other person, having a right to vote, being the nearest then present in place or office to the person or persons so absenting himself or themselves, shall hold the Court, or preside in the meeting or assembly hereby appointed, and shall have the same power and authority in all respects therein, as belongs to the mayor, bailiff, or bailiffs, or other chief officer or officers of the same city, borough, or town corporate, at any court or assembly for the election of officers for such place, or for doing any other act necessary to be done in order to such election.

2. THAT if it shall happen that in any city, borough, or town corporate within that part of Great Britain called England, Wales, and Berwick-upon-Tweed, no election shall be made of the mayor, bailiff or bailiffs, or other chief officer or officers of such city, borough, or town corporate upon the day, or within the time appointed by charter or usage for that purpose, and that no election of such officer or officers, shall be made pursuant to the directions hereinbefore prescribed, or such election being made, shall afterwards become void, as aforesaid, in every such case it shall and may be lawful for his Majesty's Court of King's Bench, upon motion to be made in the said Court, to award a writ or writs of *mandamus*, requiring the members or persons of such city, borough, or town corporate, having a right to vote at, or to do any other act necessary to be done in order to such election respectively, to assemble themselves upon a day and at a time to be prefixed in such writ or writs, and to proceed to the election of a mayor, bailiff or bailiffs, or other chief officer or officers, as the case shall require, and to do every act necessary to be done in order to such election, or to signify to the said Court good cause to the contrary, and thereupon to cause such proceedings to be had and made as in other cases of writs of *mandamus*, granted by the said Court for election of officers of corporations, and of the day and time appointed in and by any such writ or writs of *mandamus* for holding such assembly, public notice in writing shall, by such person as the Court shall appoint, be affixed in the market-place, or some other public place within such city, borough, or town corporate, by the space of six days before the day so appointed, and such officer or other person respectively shall preside in such assembly as ought to have presided at the election of such mayor, bailiff or bailiffs, or other chief officer or officers, or at the doing any other act necessary to be done in order to such election, in case the same

had been made or done upon the day hereinbefore prescribed for that purpose.

3. AND whereas in certain boroughs and towns corporate within that part of Great Britain called England, Wales, and Berwick-upon-Tweed, the mayor, bailiff or bailiffs, or other chief officer or officers, is or are to be nominated, elected, or sworn at a Court Leet, or view of frankpledge or some other Court, and by reason of the contrivance or default of the lord, or his steward, or such other officer, by or before whom such Court ought to be held, in not holding the same, or by some accident it hath happened, and may hereafter happen, that no due nomination, election, or swearing of such mayor, bailiff or bailiffs, or other chief officer or officers, hath been or shall be had or made, be it further enacted, That in every such case it shall and may be lawful to and for his Majesty's Court of King's Bench, upon motion to be *made in the said Court, to [*444] award a writ of *mandamus*, requiring the lord, or his steward, or other officer, by or before whom such Court ought to be held, to hold, or cause to be holden, such Court Leet, or other Court, and to do every other act necessary to be done by him in order to such nomination, election, or swearing, at such day and time as shall be for that purpose judged proper by the Court of King's Bench, and shall be appointed in such writ, or to signify to the said Court good cause to the contrary, and thereupon to cause such proceedings to be had and made as in other cases of writs of *mandamus* granted by the said Court for holding of any Court, and of the day and time appointed in and by any such writ of *mandamus* for holding such Court, publick notice in writing shall by such person as the said Court of King's Bench shall appoint, be affixed in the market-place, or some other publick place within such borough, or town corporate, by the space of six days before the day so appointed; and where a nomination of persons in order to the election of any such mayor, bailiff or bailiffs, or other chief officer or officers, is to be made at such Court Leet, or other Court, in every such case, after such nomination made, all and every act and acts necessary to be done in order to such election, shall be had, made, and done at such assembly, and in such manner and form as the same ought to have been had, made and done, in case such election had been made upon the day next after the expiration of the time prescribed for such election, by the charter or usage of such borough or corporation, according to the directions hereinbefore mentioned.

6. THAT where any writ of *mandamus* shall issue out of the Court of King's Bench, in any of the cases aforesaid, the person or persons to whom such writ shall be directed shall make his or their return to the first writ of *mandamus*.(a)

(a) See stat. 9 Ann. c. 20, s. 1.

12 GEO. 3, c. 21.

An Act for giving Relief in Proceedings upon Writs of Mandamus for the Admission of Freemen into Corporations; and for other Purposes therein mentioned.(b)

WHEREAS divers persons, who have a right to be admitted citizens, burgesses, or freemen, of divers cities, towns corporate, boroughs, cinque ports and places, within that part of Great Britain called England and Wales, being refused to be admitted thereto, have, in many cases no other ordinary remedy to procure themselves to be admitted to the franchises of being citizens, burgesses, or freemen, than by writs of *mandamus*, the proceedings on which are very dilatory and expensive; and, although any such writ of *mandamus* is obeyed, the person applying is nevertheless put to great and unnecessary trouble, delay, and expense: And whereas by the laws now in being, in many cases no provision is made for giving costs to the party suing out any such writ where the same is obeyed; for remedy whereof, it was enacted, that from and after the first day of August, one thousand seven hundred and seventy-two, where any person shall be entitled to be admitted a citizen, burgess, or freeman of any such city, town corporate, borough, cinque port, or place, and shall apply to the mayor, or other person, officer or officers, in such city, town corporate, borough, cinque port, or place, who hath or have authority to admit citizens, burgesses, and freemen therein, to be admitted a citizen, burgess, or *freeman thereof; and shall give notice, specifying the nature of [*445] his claim, to such mayor, or other officer or officers, that if he or they shall not so admit such person a citizen, burgess, or freeman, within one month from the time of such notice, the Court of King's Bench will be applied to for a writ of *mandamus*, to compel such admission; and if such mayor, or other officer or officers, shall, after such notice, refuse or neglect to admit such person, and a writ of *mandamus* shall afterwards issue to compel such mayor, or other officer or officers, to make such admission, and, in obedience to such writ, such persons shall be admitted by the said mayor, or other officer or officers, a citizen, burgess, or freeman of such city, town corporate, borough, cinque port, or place, then such person shall (unless the Court shall see just cause to the contrary) obtain and receive from the said mayor, or other officer or officers so neglecting or refusing as aforesaid, all the costs to which he shall have been put in applying for obtaining and serving such writ of *mandamus*, and enforcing the same, by a rule to be made by the Court out of which such writ shall issue, for the payment thereof, together with the costs of applying for, obtaining, serving, and enforcing the said rule; and if the rule so to be made shall not be obeyed, then the same shall be enforced in

(b) Only so much of this statute is given as appertains to the subject "*mandamus*."

such manner as other rules made by the said Court are or may be enforced by law.

38 GEO. 3, c. 52.

An Act to regulate the Trial of Causes, Indictments, and other Proceedings, which arise within the Counties of certain Cities and Towns Corporate within this Kingdom.(a) [1st June, 1798.

WHEREAS there at present exists, in the counties of cities and of towns corporate within this kingdom, an exclusive right, that all causes and offences which arise within their particular limits should be tried by a jury of persons residing within the limits of the county of such city or town corporate; which ancient privilege, intended for other and good purposes, has in many instances been found, by experience, not to conduce to the ends of justice: And whereas it will tend to the more effectual administration of justice, in certain cases, if actions, indictments, and other proceedings, the causes of which arise within the counties of cities and towns corporate, were tried in the next adjoining counties: In order therefore to remedy this mischief for the future, it is enacted, that from and after the passing of this act, in every action, whether the same be transitory or local, which shall be prosecuted or depending in any of his Majesty's Courts of Record at Westminster, and in every indictment removed into his Majesty's Court of King's Bench by writ of certiorari, and in every information filed by his Majesty's attorney or solicitor general, or by the leave of the Court of King's Bench, and in all cases where any person or persons shall plead to or traverse any of the facts contained in the return to any writ of mandamus, if the venue in such action, indictment, or information, be laid in the county of any city or town corporate within that part of Great Britain called England, or if such writ of mandamus be directed to any person or persons, body politick and corporate, that it shall and may be lawful for the Court in which such action, indictment, information, or other proceeding shall be depending, at the prayer and instance of any prosecutor or plaintiff, or of any defendant, to direct the issue or issues joined in such action, indictment, information, or proceeding, to be tried by a jury of the *county next adjoining to the county of such city or town corporate, and to award proper writs of venire and distringas accordingly, if the said Court shall think it fit and proper so to do.

IX. And be it further enacted by the authority aforesaid, that for the purposes of this act, the county of York shall be considered the next adjoining county to the county of the town of Kingston-upon-Hull; the

(a) Only so much of this act is here given as relates to the subject "Mandamus."

county of Northumberland as the next adjoining county to the county of the town of Newcastle-upon-Tyne.

X. Provided always, that nothing contained in this act shall extend, or be construed to extend, to the cities of London and Westminster, or the borough of Southwark, or the city or county of the city of Bristol, or the city or county of the city of Chester, or to the criminal jurisdiction of the city of Exeter and county of the same city, unless in cases of indictment removed into his Majesty's Court of King's Bench by writ of certiorari, from any court of criminal jurisdiction, within the said city or county of the said city of Exeter.

XI. Provided also, that nothing in this act shall extend, or be construed to extend, to take away any other rights or privileges which have been anciently granted to such corporations, by royal charters or grants, and which have been immemorially held and enjoyed by such corporations; but that they shall continue in the full possession of all their other exclusive rights and privileges as much as if this act of Parliament had never passed, and that they shall not be obliged to attend as jurymen upon the trial of any cause or any indictment which may be removed from the limited jurisdiction to the county at large, nor upon the trial of any other cause, or any other indictment, which may be tried before his Majesty's justices of assize, oyer and terminer, and general gaol delivery, in the next adjoining county.

1 WM. 4, c. 21.

An Act to improve the Proceedings in Prohibition and on Writs of Mandamus.(a) [30th March, 1831.

Sect. 3. And whereas the provisions contained in a certain act of Parliament passed in the ninth year of the reign of queen Anne, intituled "An Act for rendering the Proceedings upon writs of Mandamus and Informations in the Nature of a Quo warranto more speedy and effectual, and for the more easy trying and determining the Rights of Offices and Franchises in Corporations and Boroughs," relating to *the writs of mandamus* therein mentioned, *have been found useful and convenient, and the same ought to be extended to the proceedings on other such writs*; it is enacted, that the several enactments contained in the said statute relating to the return to writs of mandamus, and the proceedings on such returns, and to the recovery of damages and costs, *shall be and the same are hereby extended and made applicable to all other writs of mandamus, and the proceedings thereon*, except so far only as the same may be varied or altered by this act.

(a) Only so much of this act is here given as relates to "Mandamus." This act is recited in 6 & 7 Vict. c. 67, post, p. 451.

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Sect. 4. And whereas writs of mandamus, (*other than such as relate to the offices and franchises mentioned in or provided for by the said act made in the ninth year of the reign of Queen Anne,*) are sometimes issued to officers and other persons, commanding them to admit to offices, or do or perform other matters, in respect whereof the persons to whom such writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices or matters; and it may be proper [*447] that such officers and persons should in certain cases be *protected against the payment of damages or costs to which they may otherwise become liable; it is enacted, that it shall be lawful for the Court to which application may be made for any writ of mandamus, (*other than such as relate to the said offices and franchises mentioned in or provided for by the said act made in the reign of Queen Anne,*) if such Court shall see fit so to do, to make rules and orders, calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to shew cause against the issuing of such writ and payment of costs of the application: and upon the appearance of such other person in compliance with such rules, or in default of appearance after service thereof; to exercise all such powers and authorities, and make all such rules and orders, applicable to the case, *as are or may be given or mentioned by or in any act passed or to be passed during this present session of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims:*(a) Provided always, that the return to be made to any such writ, and issues joined in fact or in law upon any traverse thereof, or upon any demurrer, shall be made and joined by and in the name of the person to whom such writ shall be directed; but nevertheless the same shall and may, if the Court shall think fit so to direct, be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules; and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings, at his own expense; and in such case, if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person or persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs and enforcing the judgment as the person to whom the writ shall have been directed might and would otherwise have had.

Sect. 5. That in case the return to any such writ shall, in pursuance of the authority given by this act, be expressed to be made on behalf of any other person as aforesaid, the further proceedings on such writ shall not abate or be discontinued by the death or resignation of, or removal from office of, the person having made such return, but the same shall

(a) There was no act to that effect passed in the "then present session of Parliament;" but see 1 & 2 Wm. 4, c. 58, post, p. 448, which is by sect. 8, substituted for it.

and may be continued and carried on in the name of such person; and if a peremptory writ shall be awarded, the same shall and may be directed to any successor in office or right to such person.

Sect. 6. And for making some further provision for the payment of costs on applications for *mandamus*, be it further enacted, That in all cases of application for any writ of *mandamus* whatsoever, the costs of such application, (*whether the writ shall be granted or refused*,) and also the costs of the writ, if the same shall be issued and obeyed, *shall be in the discretion of the Court*, and the Court is hereby authorized to order and direct by whom and to whom the same shall be paid.

*1 & 2 Wm. 4, c. 58.

[*448]

An Act to enable Courts of Law to give Relief against adverse Claims made upon Persons having no Interest in the Subject of such Claims.(a)
[20th October, 1831.

WHEREAS it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in equity against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expense and delay; for remedy thereof IT IS ENACTED, THAT upon application made by or on behalf of any defendant sued in any of his Majesty's Courts of Law at Westminster, or in the Court of Common Pleas of the County Palatine of Lancaster, or the Court of Pleas of the County Palatine of Durham, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration, and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court or to pay or dispose of the subject-matter of the action in such manner as the Court (or any Judge thereof) may order or direct, it shall be lawful for the Court, or any Judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the meantime to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to

(a) This statute being in effect (see sect. 8, post, p. 449,) referred to by 1 Wm. 4, c. 21, s. 4, ante, p. 446, and its provisions generally being made applicable to the writ of *mandamus* by such last mentioned act, it is therefore given at length.

direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein, as to costs and all other matters, as may appear to be just and reasonable.

II. And be it further enacted, That the judgment in any such action or issue as may be directed by the Court or Judge, and the decision of the Court or Judge in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.

III. And be it further enacted, That if such third party shall not appear upon such rule or order to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order to be made after appearance, it shall be lawful for the Court or Judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred from prosecuting his claim against the original defendant, his executors or administrators; *saving nevertheless the right or claim of such third party against the plaintiff*; and thereupon to make such order between such defendant and the plaintiff, as to costs and other matters, as may appear just and reasonable.

IV. Provided always, and be it further enacted, That no order shall be made in pursuance of this act by a single Judge of the Court of Pleas of [449] the said County Palatine of Durham who shall not also be *a Judge of one of the said Courts at Westminster, and that every order to be made in pursuance of this act by a single Judge not sitting in open Court, shall be liable to be rescinded or altered by the Court in like manner as other orders made by a single Judge.

V. Provided also, and be it further enacted, That if upon application to a Judge, in the first instance or in any latter stage of the proceedings, he shall think the matter more fit for the decision of the Court, it shall be lawful for him to refer the matter to the Court; and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court, instead of the order of a Judge.

VI. And whereas difficulties sometimes arise in the execution of process against goods and chattels, issued by or under the authority of the said Courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons not being the parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions; and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers; be it therefore further enacted, That when any such claim shall be made to any goods or chattels taken or intended to be taken in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the Court from which the process issued, upon applica-

tion of such sheriff or other officer made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of Court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims and the relief and protection of the sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and make such rules and decisions as shall appear to be just according to the circumstances of the case; and the cost of all such proceedings shall be in the discretion of the Court.

VII. And be it further enacted, That all rules, orders, matters, and decisions to be made and done in pursuance of this act, except only the affidavits to be filed, may, together with the declaration in the cause, (if any), be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times, if required, and to secure and enforce the payment of costs directed by such rule or order; and every such rule or order so entered *shall have the force and effect of a judgment*, except only as to becoming a charge on any lands, tenements, or hereditaments; and in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by fieri facias or capias ad satisfaciendum, adapted to the case, together with the costs of such entry, and of the execution if by fieri facias; and such writ and writs may bear teste on the day of issuing the same, whether in Term or Vacation; and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more as upon any similar writ grounded upon a judgment of the Court.

VIII. And whereas by a certain act made and passed in the last session of Parliament, intituled "An Act to improve the Proceedings in Prohibition and on Writs of Mandamus,"^(a) it was among other things enacted, that it should be lawful for the Court to which application may be made for any such writ of *mandamus* as is therein in that behalf mentioned to make rules and orders calling, not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of *such writ and payment of the costs of the application; and upon the appearance of such other person in com- [*450] pliance with such rules, or in default of appearance after service thereof; to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as were or might be given or mentioned by or in any act passed or to be passed during that present session of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims: And whereas no such act was passed during the then present session of Parliament; be it therefore enacted, That upon any such application as is in the said act and hereinbefore mentioned, it shall be lawful for the Court to exercise all such powers

(a) See act 1 Wm. 4, c. 21, ante, p. 446.

and authorities, and make all such rules and orders applicable to the case, as are given or mentioned by or in this present act.

1 VICT. c. 78.

An Act to amend an Act for the Regulation of Municipal Corporations in England and Wales.(a) [17th July, 1837.

WHEREAS an act was passed in the fifth and sixth years of the reign of his present Majesty, intituled "An Act to provide for the Regulation of municipal Corporations in England and Wales," providing among other things for the election of certain officers in manner and form therein declared, but such elections have not in all cases been duly made according to the provisions of the said act: And whereas doubts are entertained by and before whom the meetings for such elections can now be convened and holden for the purpose of supplying such deficiencies: And whereas the elections of corporate officers and others are liable to be questioned by reason of any defect that may be in the title of the presiding officer before whom the election may have been had, notwithstanding that the election may have been otherwise good in all respects: For remedy thereof it is enacted:

Sect. 24. That it shall be lawful for any person whose claim shall have been rejected or name expunged at the revision of the burgess roll of any of the said boroughs to apply before the end of the Term then next following, to the Court of King's Bench for a *mandamus* to the mayor for the time being of that borough to insert his name upon the burgess roll, and thereupon for the Court to inquire into the title of the applicant to be so enrolled; and if the Court shall award such *mandamus* the mayor shall be bound to insert the name upon the burgess roll, and shall add thereunto the words "By Order of the Court of King's Bench," and shall subscribe his name to such words; and thereupon the person whose name shall be so added to the burgess roll shall be deemed a burgess, and entitled to vote and act as a burgess in all respects as if his name had been put upon the burgess roll by the mayor and assessors; and upon every such application the Court shall have power to make such order with respect to the costs as to the Court shall seem fit.

Sect. 26. And be it enacted, that after the passing of this act all the powers, authorities, and jurisdictions by an act of the eleventh year of the reign of his late Majesty King George the First, intituled "An Act for preventing the Inconveniences arising from want of elections of Mayors or other chief Magistrates of boroughs or corporations being made upon the days appointed by charter or usage for that purpose, and directing in what manner such elections should be afterwards *made,"(b) given to

[*451] his Majesty's Court of King's Bench in cases where no election

(a) Only so much of this act is given as appertains to the subject "Mandamus."

(b) See the act, ante, p. 442.

shall be made of the mayor, bailiff and bailiffs, or other chief officer or officers, of cities, boroughs, or towns corporate, upon the day or within the time appointed by charter or usage for that purpose, and that no election is made pursuant to the directions in that act prescribed, or such election being made shall afterwards become void as in that act mentioned shall and the same are hereby extended to all cases in which no election, shall be made of any mayor, alderman, councillor, or other corporate officer, or other person to any corporate office on the day or within the time appointed for any such election under the provisions of the said act of the fifth and sixth years of the reign of his present Majesty for regulating corporations, or of this act; and the said Court of King's Bench is hereby empowered in all such cases to award a *mandamus*, and cause such proceedings to be had thereupon, and to make such orders, and to do all other acts, matters and things in respect thereof, as fully and effectually as the said Court is now by law authorized in any other cases of *mandamus* for the election of any officers of corporations; and the election to be held under such *mandamus* shall be held and the proceedings thereon conducted within the borough in the same manner and under the like regulations and provisions as are in the said act of his Majesty King George the First enacted and provided.

6 & 7 VICT. c. 67.

An Act to enable Parties to sue out and prosecute Writs of Error in certain cases upon the proceedings on Writs of Mandamus.

[22nd August, 1843.]

WHEREAS writs of *mandamus* are issued by her Majesty's Court of Queen's Bench and the Courts of the Counties Palatine, and the application for the same must now be made in those Courts respectively alone: And whereas writs of *mandamus* are frequently awarded, and often in cases of considerable importance, *and the practice of issuing such writs hath of late very much increased*: And whereas it is expedient that parties interested in the issuing of or in the proceedings upon such writs respectively shall be enabled in certain cases to have the judgments and decisions of the said Court of Queen's Bench, and Courts of the Counties Palatine respectively, in respect of the said writs and of the proceedings thereon, *reviewed by a Court of Error*, if they shall so think fit, and that a certain mode of effecting the same shall be ordained and established: And whereas by a certain act made and passed in the ninth year of the reign of Queen Anne, intituled "An Act for rendering the proceedings upon Writs of *Mandamus* and Informations in the nature of a *Quo Warranto* more speedy and effectual, and for the more easy trying and determining the rights of Offices and Franchises in Corporations and

Boroughs,"(a) it was enacted, amongst other things, that in certain cases therein mentioned, when a writ of mandamus should issue and a return should be made thereunto, it should be lawful for the person suing or prosecuting such writ to plead to, or traverse, all or any of the material facts contained within the said return, to which the person making such return should reply, take issue, or demur, and such further proceedings in such manner should be had therein for the determination thereof, as might [*452] have been had if the person suing such writ *had brought his action on the case for a false return*: And whereas by an ^{*}act passed in the first year of the reign of the late King William the Fourth,(b) the said provision hereinbefore mentioned of the said herein first-recited act was extended to writs of mandamus in all other cases, and to the proceedings thereon: And whereas in neither of the said recited acts, nor in any other act, is any power or authority given to the person prosecuting such writ of mandamus to demur to the return made to any such writ, so that the decision of the said Courts respectively as to the validity of such return *could be reviewed by a Court of Error*; for remedy whereof *it is enacted*, THAT IN ALL CASES in which the person prosecuting any such writ heretofore issued or hereafter to be issued shall wish or intend to object to the validity of any return already made or hereafter to be made to the same, he shall do so by way of *demurrer* to the same, in such and the like manner as is now practised and used in the Courts hereinbefore mentioned respectively in personal actions; and thereupon the said writ and return and the said demurrer shall be entered upon record in the said Courts respectively, and such and the like further proceedings shall be thereupon had and taken as upon a demurrer to pleadings in personal actions in the said Courts respectively; and the said Courts respectively shall thereupon adjudge either that the said return is valid in law, or that it is not valid in law, or that the writ of mandamus is not valid in law; and if they adjudge that the said writ is valid in law, but that the return thereto is not valid in law, then and in every such case they shall also by their said judgment award that a peremptory (c) mandamus shall issue in that behalf, and thereupon such peremptory writ of mandamus may be sued out and issued accordingly, at any time after four days from the signing of the said judgment; and it shall be lawful for the said Courts respectively, and they are hereby required, in and by their said judgment to award costs to be paid to the party in whose favour they shall thereby decide by the other party or parties.

II. And that whenever any such judgment as is hereinbefore mentioned shall be given, or whenever issue in fact or in law shall be joined upon any pleadings in pursuance of the said recited acts or either of them, and judgment shall be given thereon by any of the Courts aforesaid, it shall be lawful for any party to the record in any of such cases, who shall

(a) For this act, see ante, p. 439.

(b) For this act, see ante, p. 446.

(c) Lord Denman, C. J., in *The Queen v. Earl of Dartmouth*, 5 Q. B. 881, said that the word "peremptory" is an unfortunate word in the act.

think himself aggrieved by such judgment, to *sue out and prosecute a writ of error* for the purpose of reversing the same, in such manner and to such Court or Courts as a party to any personal action in the said Court may now sue out and prosecute a writ of error upon the judgment in such action; and such and the like proceedings shall thereupon be had and taken, and such costs awarded, as in ordinary cases of writs of error upon judgments of the said Courts respectively in personal actions; and if the judgment of such Court be reversed by the Court of Error, the said Court of Error shall thereupon by their judgment not only reverse the same, but shall also in addition thereto give the same judgment which the Court whose judgment is so reversed ought to have given in that behalf; and if by their said judgment they shall award that a peremptory writ of mandamus shall issue, the same shall and may accordingly be issued by the proper officer in the office from which such writs issue, as the case may be, upon production to him of an office copy of the said judgment of the Court of Error, which shall be his authority and warrant for so doing: Provided always, that bail in error to the amount of fifty pounds, or such other sum as may by any rule of practice be appointed as hereinafter provided, shall be duly put in within four days after the allowance of the said writ of error, and the same shall afterwards be duly perfected according to the practice of the Court wherein the said original judgment was given, otherwise the plaintiff in error shall be deemed to have abandoned his writ of error, and the same shall not be further prosecuted.

III. That no action, suit, or any other proceeding shall be commenced or prosecuted against any person or persons whatsoever for or by reason of any thing done in obedience to any peremptory writ of mandamus issued by any Court having authority to issue writs of mandamus.

IV. That the said Courts of Error who are hereby empowered to take cognizance of the matters aforesaid may make, and they are hereby directed to make, from time to time and as often as they shall see occasion, such rules of practice in reference to the said application and the proceedings thereon, and in reference to the writs of error hereinbefore mentioned and the proceedings thereon, and the amount of bail to be taken, as the said Courts respectively may deem necessary to effectuate the intention of this act in relation to the same respectively.

6 & 7 VICT. c. 89.

An Act to amend an Act for the Regulation of Municipal Corporations in England and Wales.(a) [24th August, 1843.

Sect. 5, after reciting that it is expedient to render certain proceedings

(a) Only so much of this act is given as has relation to the subject "Mandamus."

by way of mandamus, so far as they affect corporate offices in boroughs, more summary and expeditious, it is enacted, That from and after the passing of this act, in all cases of intended application to the Court of Queen's Bench for a mandamus to proceed to an election of any corporate officer or officers in any of the boroughs in that act mentioned, it shall be lawful for the party intending to make such application to give notice in writing thereof to the party to be affected thereby at any time not less than ten days before the day in the said notice specified for making such application, in which notice shall be set forth the name and description of the party by whom such application will be made, together with a statement of the grounds thereof, and at the same time to deliver with such notice a copy of the affidavits whereby the application will be supported; and thereupon it shall be lawful for the said last mentioned party to shew cause in the first instance against such application, and if no sufficient cause be shewn, it shall be lawful for the said Court of Queen's Bench, on proof of the due service of such notice and statement and of the delivery of a copy of such affidavits as may be used for the purpose of supporting such application, to make the rule for such mandamus absolute, if the said Court shall think fit, in the first instance, and also, if they shall think fit, to direct that any writ of mandamus thereby ordered to be used shall be peremptory in the first instance.^(b)

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*APPENDIX

OF THE

IRISH STATUTES

RELATING TO THE

HIGH PREROGATIVE WRIT OF MANDAMUS.

THE writ of mandamus as it obtains in Ireland, is as to its formulæ, made by statute identical with that writ, as dispensed in England, the words of the statutes being oftentimes verbatim the same. Thus the provisions of the Irish statute 19 Geo. 2, c. 12, will be found to be the same as those of the stats. 9 Ann. c. 20, and 11 Geo. 1, c. 4. Again, the Irish statute 9 & 10 Vict. c. 113, contains the aggregate provisions

(b) 3 Steph. Con. 685, n. (q).

of the English statutes, 1 Wm. 4, c. 21, 1 & 2 Wm. 4, c. 58, and 6 & 7 Viet. c. 67, so that it may with accuracy be said, that the formulæ of the writ in both portions of the United Kingdom are governed by the same statutory enactments.

19 GEO. 2, c. 12.(a)

An Act for the better Regulating Corporations. [A. D. 1745.

WHEREAS divers persons have of late illegally intruded themselves into, and have taken upon themselves to execute the offices of mayors, bailiffs, portreeves and other offices within cities, towns corporate, boroughs and places within this kingdom, and where such offices were annual offices, it has been found very difficult, if not impracticable by the laws now in being, to bring to a trial and determination the right of such persons to the said offices within the compass of the year, and where such offices were not annual offices, it has been found difficult to try and determine the right of such persons to such offices, before they have done divers acts in their said offices prejudicial to the peace, order, and good government within such cities, towns corporate, boroughs, and places wherein they have respectively acted, and whereas divers persons who had a right to such offices, or to be burgesses, or freemen of such cities, towns corporate, boroughs or places, have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted or restored to their said offices or franchises of being burgesses or freemen, than by writs of mandamus, the proceedings on which are dilatory and [*155] expensive, whereby great *mischiefs have already ensued, and more are likely to ensue, if not timely prevented.

And whereas in many cities, boroughs, and towns corporate within this kingdom, the election of the mayor, bailiff or bailiffs, or other chief officer or officers, is by charter or ancient usage confined to a particular day or time without any provision how to act or proceed in case no election be then made, and it frequently happens, that by such charter or usage, particular acts are required to be done at certain times in order to and for the completing of such elections, and by the contrivance or default of the person or persons who ought to hold the Court or preside in the assembly where such elections are to be made or such acts to be done, or by accident, it has sometimes happened, and may frequently do so if not timely prevented, that no Courts or assemblies have been held, or elections made, or such acts done within the time fixed for that purpose; in which cases if elections of such offices could not afterwards be made or completed, or if in consequence of such omission the corporation should be dissolved,

(a) Only so much of this act is given as relates to the subject, "Mandamus."

great mischiefs might ensue; for remedy and prevention, whereof it is enacted, that from and after the first day of Trinity Term in the year of our Lord one thousand seven hundred and forty-six, where any writ of mandamus shall issue out of the Court of King's Bench in this kingdom in any of the cases aforesaid, such person or persons, who by the laws of this realm are required to make a return to such *writ of mandamus*, shall make his or their return to the first *writ of mandamus*.

Sect. 2. And that from and after the said first day of Trinity Term, as often as in any of the cases aforesaid any *writ of mandamus* shall issue out of the Court of King's Bench, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of mandamus to plead to or traverse all or any of the material facts contained within the said return, to which the person or persons making such return shall reply, take issue or demur, and such further proceedings, and in such manner shall be had therein for the determination thereof as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return, and if any issue shall be joined in such proceeding, the person or persons suing such writ shall and may try the same in such place, as an issue joined in such action on the case should or might have been tried, and in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by *nil dicit*, or for want of a replication or other pleading he or they shall recover his or their damages and costs in such manner, as he or they might have done in such action on the case as aforesaid, such costs and damages to be levied by *capias ad satisfaciendum*, *fieri facias* or *elegit*; and a peremptory *writ of mandamus* shall be granted without delay for him or them for whom judgment shall be given, as might have been if such return had been adjudged insufficient, and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid.

Sect. 3. Provided always, that if any damages shall be recovered by virtue of this act against such person or persons making such return to such writ as aforesaid, he or they shall not be liable to be sued in any other action or suit for the making such return, any law, usage or custom to the contrary thereof in anywise notwithstanding.

Sect. 6. And that it shall and may be lawful to and for the said Court of King's Bench to allow to such person or persons respectively to whom any writ of mandamus shall be directed, or to the person or persons who shall sue or prosecute the same, such convenient time respectively to make a return, plead, reply, rejoin, or demur as to the said Court shall seem just and reasonable, anything herein contained to the contrary thereof in anywise notwithstanding.

Sect. 7. And that if in any city, borough, or town corporate, within this kingdom, no election shall be made of the mayor, bailiff or [*456] bailiffs, *or other chief officer or officers of such city, borough, or

town corporate, upon the day or within the time appointed by charter or ancient usage, or by the rules, orders, and directions made and established by the lord lieutenant and council of this kingdom, for the better regulating of corporations pursuant to the act of the seventeenth year of his late Majesty King Charles the Second for such elections, or such elections being made shall afterwards become void, whether such omission or avoidance shall happen through the default of the officer or officers, who ought to hold the Court, or preside where such election is to be made, or by any accident or other means whatsoever, the corporation shall not thereby be deemed or taken to be dissolved, or disabled from electing such officer or officers for the future, but in any case where no election shall be made as aforesaid, it shall and may be lawful for the members or persons of such city, borough, or corporation who have a right to vote or be present at or to do any other act necessary to be done in order to or for the completing of such election, and they or such of them as shall not be hindered by any reasonable impediment or excuse are hereby required respectively to meet and assemble together in the Town Hall, or other usual place of meeting for making such election within such city, borough, or town corporate, upon the day next after the expiration of the time within which such election ought to have been made unless such day shall happen to be a Sunday, and then upon the Monday following between the hours of ten in the morning, and two in the afternoon of the same day, and that the members or persons having a right to vote at, or to do any other act necessary to be done in order to such election, or such of them as shall be so assembled or met together, shall forthwith proceed to the election of a mayor, bailiff or bailiffs or other chief officer or officers for such city, borough, or corporation, and to do every act necessary to be done in order to or for the completing of such election, in such manner as was usual in, or in order to, the election of such officer or officers upon the day or within the time appointed by charter or usage, or by the rules, orders, and directions aforesaid for such election, and in case upon such day of meeting hereby appointed for such election, the mayor, bailiff or bailiffs, or other proper officer or officers, who ought to have held the Court, or presided at the assembly for such election, or doing any other act necessary to be done in order to such election, if the same had been made or done on the day fixed, or within the time limited by charter or usage, or by the rules, orders, and directions of the lord lieutenant and council aforesaid for that purpose, shall be absent then such other person having a right to vote being the nearest then present in place or office to the person or persons so absenting himself or themselves, shall hold the Court, or preside in the meeting or assembly hereby appointed, and shall have the same power and authority in all respects therein, as belongs to the mayor, bailiff or bailiffs, or other chief officer or officers of the same city, borough, or town corporate, at any Court or assembly for the election of officers for such place, or for doing any other act necessary to be done in order to such election.

Sect. 8. And that if it shall happen, that in any city, borough, or town corporate within this kingdom no election shall be made of the mayor, bailiff or bailiffs, or other chief officer or officers of such city, borough, or town corporate, upon the day or within the time appointed by charter or usage, or by the rules, orders, and directions of the lord lieutenant and council aforesaid, for that purpose, and that no election of such officer or officers shall be made pursuant to the directions hereinbefore prescribed, or such election being made, shall afterwards become void as aforesaid, in every such case it shall and may be lawful for his Majesty's Court of King's Bench upon motion to be made in the said Court to award a writ or writs of mandamus, requiring the members or persons of such city, borough, or town corporate, having a right to vote at or to do any other [*457] act necessary to be done in order to such election, respectively to assemble themselves upon a day *and at a time to be prefixed in such writ or writs, and to proceed to the election of a mayor, bailiff, or bailiffs, or other chief officer or officers as the case shall require, and to do every act necessary to be done in order to such election or to signify to the said Court good cause to the contrary, and thereupon to cause such proceedings to be had and made, as in other cases of mandamus granted by the said Court, of election of officers of corporations, and of the day and time appointed in and by any such writ or writs of mandamus for holding such assembly, public notice in writing shall by such person as the said Court shall appoint, be fixed in the market place, or some other public place within such city, borough, or town corporate, by the space of six days before the day so appointed, and such officer or other person respectively shall preside in such assembly, as ought to have presided at the election of such mayor, bailiff or bailiffs, or other chief officer or officers, or at the doing of any other act necessary to be done in order to such election, in case the same had been made or done upon the day herein before prescribed for that purpose.

Sect. 15. And that where any writ of *mandamus* shall issue out of the Court of King's Bench in any of the cases aforesaid, the person or persons to whom such writ shall be directed, shall make his or their return to the first writ of *mandamus*.

Sect. 16. And that after the said first day of Trinity Term an act made in the sixth year of the reign of her late Majesty queen Anne, intituled "An Act for the Amendment of the Law and better Advancement of Justice," and all the statutes of jeofails shall be extended to all writs of *mandamus* and proceedings thereon, for any of the matters in this Act mentioned.



1 WM. 4, c. 21.

An Act to Improve the Proceedings in Prohibition, and on Writs of Mandamus.(a) [30th March, 1831.

1 WM. 4, c. 58.

An Act to enable Courts of Law to give Relief against Adverse Claims made upon persons having no Interest in the subject of such Claims.(b) [20th October, 1831.

*9 & 10 VICT. c. 113.

[*458]

An Act to improve the Proceedings in Prohibition and on Writs of Mandamus in Ireland.(c) [28th August, 1846.

WHEREAS by an act passed in the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to improve the Proceedings in Prohibition and on Writs of Mandamus," certain provisions were made relating to applications for writs of prohibition, and to the proceedings thereon, and to damages and costs of such applications and proceedings; and it is expedient that the said provisions should be extended to and be in force in Ireland: It is enacted, that the several enactments contained in the said statute relating to applications for writs of prohibition, and to declarations and other pleadings and proceedings thereon, and to the recovery of costs and damages therein, shall be and the same are hereby extended to and shall be in force in Ireland.

II. And whereas the provisions contained in an act passed in the Parliament of Ireland in the nineteenth year of the reign of his late Majesty King George the Second, intituled "An Act for the better Regulation of Corporations," relating to the writs of *mandamus*, therein mentioned, have been found useful and convenient, and the same ought to be extended to the proceedings on other such writs; it is enacted, That the

(a) This act (set forth, ante, p. 446,) although in terms applicable to England only, has been by stat. 9 & 10 Vict. c. 113, s. 1 (l.), (set forth, post, p. 458), expressly extended to Ireland.

(b) This act (set forth, ante, p. 448, and n. (a)), although in terms applicable to England only, has been by stat. 9 & 10 Vict. c. 113, s. 1 (l.), (set forth, post, p. 458,) expressly extended to Ireland.

The provisions of the above act, 1 & 2 Wm. 4, c. 58, are made applicable to cases of *mandamus* by the previous stat. 1 Wm. 4, c. 21, s. 4 (ante, p. 446.)

(c) This act, although it makes certain acts of Parliament relative to England applicable also to Ireland, yet it is silent as to the act 6 & 7 Vict. c. 89, ante, p. 453.

several enactments contained in the said last-mentioned statute relating to the returns to writs of *mandamus*, and the proceedings on such returns, and to the recovery of damages and costs, shall be and the same are hereby extended and made applicable to all other writs of *mandamus*, and the proceedings thereon, except so far only as the same may be varied or altered by this act.

III. And whereas writs of *mandamus*, other than such as relate to the offices and franchises mentioned in or provided for by the said act made in the nineteenth year of the reign of King George the Second, are sometimes issued to officers and other persons, commanding them to admit to offices or do or perform other matters in respect whereof the persons to whom such writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices or matters; and it may be proper that such officers and persons should in certain cases be protected against the payment of damages or costs to which they may otherwise become liable; be it therefore enacted, That it shall be lawful for the Court in Ireland to which application may be made for any writ of *mandamus* (other than such as relate to the said offices and franchises mentioned in or provided for by the said act made in the reign of King George the Second,) if such Court shall see fit so to do, to make rules and orders calling not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to show cause against the issuing of such writ, and payment of costs of the application; and upon the appearance of such other person in compliance with such rules, or in default of appearance after service thereof, to exercise all such powers and authorities, and make all such rules and orders applicable to the case, as are or may be given or mentioned by or in any act passed or to be passed during this present session of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims: Provided always, that the return to be made to any such writ, and issues joined in fact or in law upon any traverse thereof, [*459] or upon any demurrer, shall be *made and joined by and in the name of the person to whom such writ shall be directed; but nevertheless the same shall and may, if the Court shall think fit so to direct, be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules, and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense; and in such case, if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person or persons on whose behalf the return shall be expressed to be made, and who shall have the like remedy for the recovery of costs and enforcing the judgment as the person to whom the writ shall have been directed might and would otherwise have had.

IV. That in case the return to any such writ shall in pursuance of the authority given by this act, be expressed to be made on behalf of any other person as aforesaid, the further proceedings on such writ shall not abate or be discontinued by the death or resignation of or removal from office of the person having made such return, but the same shall and may be continued and carried on in the name of such person; and if a peremptory writ shall be awarded the same shall and may be directed to any successor in office or right to such person.

V. And for making some further provisions for the payment of costs on application for *mandamus*, be it enacted, That in all cases of applications for any writ of *mandamus* whatsoever in Ireland the costs of such application whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court, and the Court is hereby authorized to order and direct by whom and to whom the same shall be paid.

VI. And whereas it is expedient that parties interested in the issuing of or in the proceedings upon writs of *mandamus* shall be enabled in certain cases to have the judgments and decisions of the Court of Queen's Bench in Ireland in respect of the said writs, and of the proceedings thereon, reviewed by a Court of Error, if they shall so think fit, and that a certain mode of effecting the same shall be ordained and established; and whereas there is not any power or authority given by the said recited act of the reign of his Majesty King George the Second to the person prosecuting a writ of *mandamus* to demur to the return made to any such writ, so that the decision of the said Court of Queen's Bench as to the validity of such return could be reviewed by a Court of Error; for remedy whereof, therefore, be it enacted, That in all cases in which the person prosecuting any writ of *mandamus* heretofore issued or hereafter to be issued shall wish or intend to object to the validity of any return heretofore made or hereafter to be made to the same, he shall do so by way of demurrer to the same, in such and the like manner as is now practised and used in the said Court in personal actions, and thereupon the said writ and return and the said demurrer shall be entered on record in the said Court, and such and the like further proceedings shall be thereupon had and taken as upon a demurrer to pleadings in personal actions in the said Court; and the said Court shall thereupon adjudge either that the said return is valid in law, or that it is not valid in law, or that the writ of *mandamus* is not valid in law; and if the Court adjudge that the said writ is valid in law, but that the return thereto is not valid in law, then and in every such case the Court shall also by the said judgment award that a peremptory *mandamus* shall issue in that behalf; and thereupon such peremptory writ of *mandamus* may be sued out and issued accordingly at any time after four days from the signing of the said judgment; and it shall be lawful for the said Court and they are hereby required, in and by their said judgment, to award costs to be paid to the party in whose favour they shall thereby decide, by the other party or parties.

VII. And be it enacted, That whenever any such judgment as is hereinbefore *mentioned shall be given, or whenever issue in fact or in [*460] law, shall be joined upon any pleadings, in pursuance of the said recited act of the reign of his Majesty King George the Second and of this act, or of either of them, and judgment shall be given thereon by the said Court, it shall be lawful for any party to the record in any of such cases who shall think himself aggrieved by such judgment to sue out and prosecute a writ of error for the purpose of reversing the same, in such manner and to such Court or Courts as a party to any personal action in the said Court of Queen's Bench in Ireland may now sue out and prosecute a writ of error, upon the judgment in such action, and such and the like proceeding shall thereupon be had and taken, and such costs awarded, as in ordinary cases of writs of error upon judgments of the said Court in personal actions; and if the judgment of the said Court be reversed by the Court of Error the said Court of Error shall thereupon, by their judgment, not only reverse the same, but shall also, in addition thereto, give the same judgment which the Court whose judgment is so reversed ought to have given in that behalf; and if by their said judgment they shall award that a peremptory writ of *mandamus* shall issue, the same shall and may accordingly be issued by the proper officer in the office from which such writs issue, upon production to him of an office copy of the said judgment of the Court of Error which shall be his authority and warrant for so doing; Provided always that bail in error to the amount of fifty pounds, or such other sum as may by any rule of practice be appointed as hereinafter provided, shall be duly put in within four days after the allowance of the said writ of error, and the same shall afterwards be duly perfected according to the practice of the Court wherein the said original judgment was given, otherwise the plaintiff in error shall be deemed to have abandoned his writ of error and the same shall not be further prosecuted.

VIII. And that no action, suit, or any other proceeding shall be commenced or prosecuted in Ireland against any person or persons whatsoever for or by reason of anything done in obedience to any peremptory writ of *mandamus* issued by any Court having authority to issue writs of *mandamus*.

IX. And that the said Court or Courts of Error which are hereby empowered to take cognizance of the matters aforesaid may make and they are hereby directed to make, from time to time and as often as they shall see occasion, such rules of practice in reference to the said application and the proceedings thereon, and in reference to the writs of error hereinbefore mentioned, and the proceedings thereon, and the amount of bail to be taken, as the said Courts respectively may deem necessary to effectuate the intention of this act in relation to the same respectively.

X. And be it enacted, That this act may be amended or repealed by any act to be passed in this present session of Parliament.

*RULES, ORDERS, AND REGULATIONS, [461]

Made by the Court of B. R. in pursuance of Stat. 6 Vict. c. 20, for the government of the Practice of the Crown side of such Court in England.(a)

1. *Masters to have Custody of Records.*—The Queen's coroner and attorney, and Master on the Crown side, shall have the care and custody of the records and other proceedings on the Crown side of the said Court.

2. *Issuing Writs.*—Every writ issued on the Crown side of the Court shall be prepared and engrossed by the attorney or party suing out the same, and the name and address of such attorney or party suing out the same shall be indorsed thereon; and every such writ shall, before the issuing thereof, be sealed with a stamp to be provided for that purpose, and kept at the Crown Office, and an entry of every such writ, together with the name and address of the attorney or party issuing the same, shall be made in a book to be kept at the Crown Office for that purpose.

3. *Teste and Return of Writs.*—Every writ of subpoena shall be tested as of the day on which it is actually issued.

4. *Attachment.*—Every writ of attachment of contempt shall be tested and made returnable on a day certain in Term before the Queen at Westminster.

6. *Venire Facias Juratores.*—Every writ of venire facias juratores shall be tested as of the day on which issue is joined, or if there be a continuance, on the day of the last continuance, previous to the award of the distringas juratores, and shall be made returnable on a day certain, or immediately, before the Queen at Westminster, either in the same, or next Term, as occasion may require.

7. *Distringas.*—Every writ of distringas juratores shall be tested as of the day of the return of the venire facias juratores, and shall be made returnable on a day certain in the next ensuing Term before the Queen at Westminster.

8. *Mandamus.*—Every writ of mandamus shall be tested and made returnable on a day certain before the Queen at Westminster, and there shall be eight days at least between the teste and return of every such writ of mandamus, where the act required to be done is in London, or within forty miles thereof, and fourteen days in all other cases.

10. *Writs of Execution.*—Every writ of execution may be tested as of the day on which it actually issues, and may be made returnable either on a day certain in Term, or immediately after the execution thereof; and the party suing forth the same shall indorse thereon the place of abode, and addition of the party against whom the same is issued, or such other

(a) Only such of the rules, &c., are here given as have relation to the subject of Mandamus.

other description of him as such party suing out such writ may be able to give.

11. *Filing Writs when returned.*—Every writ issued on the Crown side of the Court, and returnable in the said Court, or before a Judge thereof, shall, together with the return made thereto, be filed according to the exigency of such writs respectively, on or before the return thereof; and such writs as are made returnable before a Judge, together with the return made thereto, and the Judge's order (if any) ^{made thereon}, or a [*462] copy thereof, shall be transmitted to the Crown Office by the clerk of such Judge, and filed there as soon as the Judge shall have made such order, or exercised his discretion thereon.

13. *Side Bar Rule to return Writs.*—A side bar rule to return a writ on the Crown side, may be obtained according to former practice without any actual motion for the same, which shall require such return to be made within four days next after service of such rule, if served in London or Middlesex, and within eight days in all other cases.

14. *No Motion to file a Writ.*—It shall not henceforth be necessary to make any motion to file any writ or other proceeding returned into the said Court, but the same shall be filed at the Crown Office without any rule first granted for that purpose.

15. *Copies of Proceedings, &c., how obtained.*—Copies of mandamus, and return and traverse, or other pleadings thereupon, and every other proceeding filed on the Crown side of the said Court, shall, when required, be made at the Crown Office, and delivered to the respective parties, or other persons requiring the same.

17. *Rule to plead—one only to be given.*—One side bar rule to plead only shall henceforth be given in all cases on the Crown side, (and it shall not be necessary to give any peremptory rule); such rule shall be drawn up and served as well in Term as in Vacation, and shall expire in ten days next after service thereof.

18. *Rules to reply, &c.*—One side bar rule only to reply, rejoin, join in demurrer or in error, shall henceforth be given, which shall be drawn up and served, (and no peremptory rule given thereon); and such last-mentioned rules shall in all cases expire in four days next after service thereof.

19. *Judgment by Default.*—In case no plea, replication, rejoinder, joinder in demurrer, joinder in error, or other pleading, shall be entered on the expiration of the time limited by such rule, judgment as for want of such pleading may be signed at the opening of the office on the next following morning, unless any order of the Court or Judge extending such time shall have been obtained and served, and in such case judgment shall not be signed, until the day after the expiration of the time granted by such order.

20. *Judgment on Verdict.*—In all cases of judgment required to be signed on verdicts given at Nisi Prius, the postea shall be produced at the Crown Office, and judgment shall in four days next after the return

of the *distringas*, or at any subsequent time, be marked thereon by one of the Masters, or the assistant Master, unless a rule shall have been obtained for a new trial, or to enter judgment *non obstante veredicto*, or to arrest judgment in cases where such rules may by the practice of the Court be obtained.

21. *No Rule for Judgment*.—It shall not henceforth be necessary to give any rule for judgment.

22. *Proceedings on Orders of Sessions removed*.—In all cases of orders removed into this Court for any inferior jurisdiction, the same shall be put into the Crown paper for argument, upon a rule to shew cause why such order should not be quashed. In all other cases, the conviction or other proceedings intended to be argued, shall be put into the Court paper on a rule for a concilium; which rule shall specify the day on which the case will be put into the paper for argument, and shall be drawn up and served six days at least before such day within forty miles from London, and eight days in all other cases.

23. *Paper Books*.—In all cases entered for argument in the Crown paper, the prosecutor, or his attorney, shall deliver a paper book of the proceedings to each of the two senior Judges of the Court, and the defendant, or his attorney, shall in like manner make and deliver a paper book to the third and fourth Judges of the said Court respectively, two days before the day on which the case will be put in the paper for argument; and such several paper books shall in all cases *(except where a [*463] special case is reserved for the opinion of the Court) contain in the margin thereof, or appended thereto, and to be delivered therewith, the points intended to be argued, but shall not contain any other observation or matter than such points for argument, together with copies of the proceedings, and a copy of the rule *nisi* to quash, or for a concilium; and judgment shall be given by the Court against the party neglecting to deliver paper books to the Judges, or delivering the same without the points for argument, if the Court shall so please.



TABLE OF FEES.

Established and ordained by the Lord Chief Justice and Judges of Her Majesty's Court of B. R., to be taken hereafter by the Queen's Coroner and Attorney and Muster, on the Crown side of the said Court pursuant to Stat. 6 Vict. c. 20. (a)

	£.	s.	d.
Copy of any proceeding, when required, not more than ten sheets	0	5	0
If more, per sheet			
Writ Fees.	0	0	6
For every attachment	0	5	0
subpoena to testify	0	2	6
attachment of contempt	0	5	0
<i>venire facias juratores</i>	0	5	0
<i>distringas juratores</i>	0	5	0
<i>capias</i> and <i>distringas ad satisfaciendum</i> , <i>elegit</i> , <i>fi. fa.</i> , <i>lev. fa.</i> , or other writ after judgment	0	5	0
mandamus			
Filing every affidavit, or other proceeding	0	1	0
Certificate of the finding or filing of any proceeding	0	5	0
Attendance on subpoena for expenses	1	1	0
at assizes, expenses only	0	0	0
before Houses of Lords and Commons, and other committees for expenses	1	1	0
Search (each time)			
Special Jury (nominating)	1	1	0
Administering oaths in Court	0	2	0
Taxing every bill of costs less than three folios	0	1	0
If more, per sheet	0	0	4
{ Affidavits and rules, search for (per Term)	0	0	4
{ Delivering out under Judge's order for production at as- sizes, &c.			
Putting case in the Crown paper for argument	0	1	0
Rules.			
For every rule to plead, reply, &c., or return a writ	0	1	0
For every other rule	0	2	0
If exceeding seventy-two words, for each eighteen words	0	0	3
Copies of rules half the charge for the original.			

(a) Only so many of the fees are here inserted as related to the subject, "Mandamus."

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